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HURRICANE KATRINA SPECIAL EDITION

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HURRICANE KATRINA SPECIAL EDITION FOREWORD

REMEMBERING OUR MISSISSIPPI GULF COAST

Kathryn E. Dennis[*]

The Monday morning hours of August 29, 2005, brought furious winds, churning waters, unfathomable destruction, and the unspeakable realization of life forever altered for most residents of the Mississippi Gulf Coast. Her name was Hurricane Katrina, her devastation vast. Many of those affected, as well as various media correspondents, believe that "[i]f the levees had held in New Orleans, the destruction wrought on the Mississippi Gulf Coast by Hurricane Katrina would have been the most astonishing storm story of a generation."[1] Whole towns were "laid flat, thousands of houses

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[*] Candidate for Juris Doctor, University of Mississippi School of Law, 2008; B.A., 2005, Wake Forest University. To the people of the Mississippi Gulf Coast, I am inspired and humbled by your strength and resiliency in the face of disaster, your story of history and renaissance, and your spirit and grace in recovery and rebuilding. I am grateful to the many authors who contributed; without their expertise and talents this publication would not have been possible. For the opportunity of seeing this Hurricane Katrina Special Edition publication to fruition, I am forever indebted to the editors and staff of the *Mississippi Law Journal* for their tireless efforts and also to Gretchen Harris for her work on the back cover design. To my family, thank you for leading by example; thank you for teaching me the importance of community, shared history, and tradition; and thank you for so eloquently imparting your wisdom and love of the Mississippi Gulf Coast.

[1] Campbell Robertson, *Coastal Cities of Mississippi in the Shadows*, N.Y. TIMES, Sept. 12, 2005, at A1.

washed away," and statewide the storm was blamed for the deaths of 231 people.[2] It was, without a doubt, the worst natural disaster to ever strike the United States, leaving in its path unparalleled destruction and despair.

But to the people of the Mississippi Coast, indeed the entire Gulf Coast area, Hurricane Katrina was not simply in abstract the worst natural disaster in United States history. It was emerging from the shell of a storm–ravaged home, climbing down from an oak tree blessed to be alive after battling hours of wind and rain, passing ruins of homes with spray–painted reminders of how many survived and how many were lost, trekking two miles through eight inches of intolerable muck only to discover that nothing remained. No house, no car, no furniture, no clothing, no pictures. Countless homes, churches, businesses, and schools along the coastline were either heavily damaged or simply gone altogether. It is impossible to capture the magnitude of destruction, devastation, and ensuing despair with mere words penned to paper. Those who saw the immediate and continuing aftermath described it as though an atomic bomb had been detonated, its annihilation extending city block after city block after city block for innumerable miles. Those away from the community truly did not and could not "understand the enormity of what happened,"[3] nor could they fathom what it would take "to put it back together again."[4]

In mere hours, over three hundred years of shared history was washed and blown asunder. Elegant beachfront homes that graced the coastline for more than a century—homes that weathered all previous storms—were reduced to matchsticks in a matter of minutes and left strewn along the shore. Inimitable landmarks, like Beauvoir, the last home of Confederate President Jefferson Davis and the site of his Presidential

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[2] *Id.* The original death toll was cited at 211 in Robertson's article, but was later revised to 231 statewide. *See* Joshua Norman, *Death Toll Anything but Certain: Professor Leads Quest for Most Accurate List of Katrina Victims*, SUN HERALD, Sept. 30, 2007, at A1.

[3] *Pass Christian Recovery Slow, But Improving* (WLOX television broadcast Nov. 29, 2006) (transcript on file with author).

[4] *Id.*

Library;[5] the Tullis-Toledano Manor;[6] much of Pass Christian's historic Scenic Drive;[7] the Tivoli Hotel;[8] Shearwater Pottery;[9] the Dantzler House; Gulfport's Grass Lawn;[10] a great portion of Beach Boulevard in Bay St. Louis; and countless other

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[5] Beauvoir was the last home of Jefferson Davis and served as his retirement home. It was built in 1852 in Biloxi and was purchased by the Davis family in 1877 for $5,500. *See* About Beauvoir—The Jefferson Davis Home and Presidential Library, http://www.beauvoir.org/history.html (last visited Feb. 6, 2008). Following Davis' death in 1889, the property descended through the Davis family and was then sold to the Mississippi Division of the Sons of the Confederate Veterans with two stipulations. *Id.* The first was that the property be used as a Confederate Veterans Home for veterans and their widows until no longer necessary, and the second that it be used "as a memorial to Jefferson Davis and the Confederate Soldier," which has been the case since 1903. *Id.* The home and Presidential Library both suffered extensive damage during Hurricane Katrina; as of February 2008, the restoration of the home is approximately seventy-five percent complete. New Beauvoir House Restoration Update, http://www.beauvoir.org/index.html (last visited Feb. 6, 2008).

[6] The manor was built in 1856 and was a "striking example of Greek Revival architecture." Tullis-Toledano Manor of Biloxi, Mississippi, http://www.tullistrees.org/Vol4No4/TullisManor.htm (last visited Feb. 6, 2008). The City of Biloxi purchased the manor in 1975, after which it served as a popular local attraction and museum. *Id.* During Hurricane Katrina, the Grand Casino Biloxi's casino barge was loosed from its moorings and settled on top of the Tullis-Toledano Manor, leaving nothing but rubble in its place. *Id.*

[7] Prior to Hurricane Katrina, Scenic Drive, home to elegant historic centuries-old beachfront homes, was one of three roads in the nation listed in its entirety on the National Historic Registry. Many of the historic homes were completely destroyed; the vast majority of those that remained sustained great damage. Pass Christian, perhaps hardest hit by Hurricane Katrina, lost eighty percent of its homes and almost half of its population. *Pass Christian Recovery Slow, But Improving* (WLOX television broadcast Nov. 29, 2006) (transcript on file with author).

[8] The Tivoli Hotel was built in 1927 in Biloxi and, prior to Hurricane Katrina, was one of few remaining Grande Dame resorts of the 1920s.

[9] The Shearwater Pottery artist community, made famous by the work of Ocean Springs artist Walter Anderson, lost at least sixteen buildings, including a vault that housed most of Anderson's work, to Hurricane Katrina. *Historical Homes On Mississippi's Coast Reduced to Rubble* (WLOX television broadcast Oct. 10, 2005) (transcript on file with author). A great deal of Anderson's art was also lost by private collectors, as was a large portion of other local artistry, such as the unique pottery of George Ohr, the "Mad Potter of Biloxi."

[10] Grass Lawn was built in 1836, constructed of hand–hewn cypress and pine timbers. The home was purchased by the City of Gulfport in 1973, and was used as a location for entertainment of dignitaries, weddings, parties, and receptions prior to Hurricane Katrina, during which it was completely destroyed. *See* City of Gulfport Dep't of Recreational Servs., *Grasslawn Historical Home*, http://www.ci.gulfport.ms.us/leisure services/grasslawn.htm (last visited Feb. 6, 2008).

structures of cultural and historical significance along the coastline were heavily damaged or obliterated entirely.

The destruction was not isolated to one community. Entire towns and most coastal areas were left unrecognizable, flattened four and five blocks inland, and flooded even farther from the shore. Over 70,000 homes were severely damaged or destroyed by Hurricane Katrina in Mississippi alone.[11] The desolation was not limited to one socioeconomic class of Gulf Coast residents. Beachfront mansions, affordable housing complexes, and businesses alike were all heaped onto the mounting wreckage.[12] Along the entire seventy-two mile length of the Mississippi Gulf front, nearly all structures within several blocks of the coastline, and most areas near bays and tributaries along the three coastal counties, were wiped from the map. Many who survived Hurricane Katrina lost homes, along with all of their possessions; some additionally lost businesses, family members, neighbors, friends. Even more crippling for some were the hampered recovery and rebuilding efforts that resulted when some parishioners were not permitted to refurbish churches on beachfront sites of worship dating back over 150 years.[13] This proved very difficult for many small, faith-rich communities

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[11] GULF COAST BUSINESS COUNCIL, REPORT: THE MISSISSIPPI GULF COAST TWO YEARS AFTER KATRINA 3 (2007), *available at* http://www.msgcbc.org/docs/TwoYearReport.pdf [hereinafter GULF COAST BUSINESS COUNCIL REPORT].

[12] Since Hurricane Katrina, over forty-six million cubic yards of debris has been removed from Mississippi, twenty-four million of which came from the three coastal counties—Hancock, Harrison, and Jackson—alone. GULF COAST BUSINESS COUNCIL REPORT, *supra* note 11, at 7. The massive piles of rubble left in Hurricane Katrina's wake totals more than three times the amount Hurricane Andrew left behind in Florida in 1992. *Id.*

[13] *See, e.g.*, Complaint, Schmidt v. Diocese of Biloxi (Miss. 1st Dist. Ch. Ct. Harrison Co. filed May 1, 2007), http://savestpauls.com/DECLARATORYJUDGMENT COMPLAINT.pdf (last visited Feb. 6, 2008). This suit involves over 150 parishioners of Saint Paul Parish in Pass Christian, who filed suit against the Diocese of Biloxi, Bishop Thomas Rodi, and Reverend Dennis Carver for their involvement in closing Saint Paul Church and suppressing the parish in the immediate aftermath of Hurricane Katrina. It was announced in March 2007 that the site where the parish had worshiped for nearly 170 years would no longer be used to house Saint Paul Church, even after funds were specifically solicited from donors around the world for the purpose of rebuilding on the beachfront site after both Bishop Rodi and Reverend Carver approved returning to the historic site.

along the Coast, where prior to Hurricane Katrina a church on the beachfront was often the center of town, and where rebuilding of the church became a vital part of recovery.

As a result of Hurricane Katrina, the cost of living skyrocketed along the Mississippi Gulf Coast, and "[h]ousing is the main reason it has become much more expensive to live in South Mississippi."[14] It is more difficult to buy a home because insurance costs have greatly escalated, and rent has increased because available apartments and homes remain scarce.[15] However, since Hurricane Katrina, the Mississippi Home Corporation has awarded $105 million in low income tax credits, facilitating the construction of over 9,000 homes for families far below the area median income.[16] More than two billion dollars in FEMA monies has also seen its way to the Coast through programs such as the Public Assistance Grant Program, which reimburses state and local governments and "certain eligible private non-profit organizations for the actual costs for work required" to rebuild.[17]

In addition to the great personal setbacks, business and industry—such as Northrop Grumman Ship Systems' Ingalls Operation, Chevron's Pascagoula Refinery, military operations at Keesler Air Force Base and the Naval Construction Battalion Center, NASA's Stennis Space Center,[18] many tenants of the Port of Gulfport, the entire Coast casino industry, and countless other large and small business owners—suffered extensive

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[14] Melissa M. Scallan, *Cost of Living Going Up: Housing, Insurance Take Ever-Larger Bite*, SUN HERALD, Nov. 4, 2007, at A2.

[15] *Id.*

[16] GULF COAST BUSINESS COUNCIL REPORT, *supra* note 11, at 3.

[17] *See FEMA Funds Surpass $9 Billion Mark for Gulf Coast Recovery*, GAZEBO GAZETTE, Jan. 4, 2008, at 12. The Gazebo Gazette is a weekly newspaper for residents and friends of Pass Christian. It was created by Evelina Schmukler, a volunteer who visited Pass Christian as a freelance writer in the aftermath of Hurricane Katrina and chose to stay after she "became fascinated by the spirit of the folks who were 'digging in' to bring their lives back to some stage of normalcy" in the wake of Hurricane Katrina. Gazebo Gazette, http://gazebogazette.passchristian.net/ (last visited Feb. 6, 2008).

[18] Stennis Space Center serves as NASA's "primary center for Rocket Propulsion Testing and home to the Applied Research and Technology Project Office." Nat'l Aeronautics and Space Admin., About NASA, http://www.nasa.gov/centers/stennis/home/index.html (last visited Feb. 6, 2008).

losses. Communications capabilities, particularly emergency communications capabilities, were "significantly hampered" as well.[19]

The immediate economic impact of closed or destroyed businesses was far from inconsequential. The state of Mississippi lost "just under $500,000 in direct gaming tax revenues for each day" that the Gulf Coast casinos were closed.[20] In addition to the losses in direct gaming tax revenues, it is also estimated that at least sixteen million dollars per month in related taxes "such as payroll taxes and sales taxes collected at casino resorts" were also lost.[21] Realizing that something needed to be done to help speed up the recovery process and restore the casino industry tax base, in October 2005, the Mississippi legislature modified established gaming laws and allowed casinos to move on shore within eight hundred feet of the shoreline in the three most southern counties, although only Hancock and Harrison Counties have approved gaming.[22] Though hard-fought and passed by a narrow majority,[23] the decision to allow a strictly regulated form of land-based gaming provided a viable outlet for rebuilding, improving the safety of casinos in the event of future storms, and helped move the Mississippi Gulf Coast onto the long road to economic recovery.

Several months after Hurricane Katrina, the Gulf Coast

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[19] *See Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks: Report and Recommendations to the Federal Communications Commission*, *in* PRACTISING LAW INSTITUTE, 24TH ANNUAL INST. ON TELECOMMUNICATIONS POLICY & REGULATION (2006).

[20] Denise von Herrmann, *Afterword* to RESORTING TO CASINOS: THE MISSISSIPPI GAMBLING INDUSTRY 169 (Denise von Herrmann ed., 2006).

[21] *Id.*

[22] *See* 2005 Miss. Laws 5th Ex. Sess. Ch. 16 (H.B. 45) (approved Oct. 17, 2005). The act amended Sections 87-1-5, 95-3-25, 97-33-1, 97-33-7, 97-33-17, 97-33-25, and 97-33-27 of the Mississippi Code to allow gaming within eight hundred feet of the mean high-water line of the waters of the state of Mississippi in the three coastal counties. *Id.* Thanks largely to the modified law, the Gulf Coast casino industry "appears to be making an extraordinary recovery." DOUGLAS M. WALKER, THE ECONOMICS OF CASINO GAMBLING 6 (2007).

[23] Ultimately, it was the impassioned "pleas of Coast senators, who waived MRE's [sic] in the air while they spoke of the need to get their constituents back to work, that held sway with relatively slim majorities" of twenty-nine to twenty-two in the Senate, and sixty to fifty-three in the House. von Herrmann, *supra* note 20, at 168.

Business Council (the Business Council), a nonprofit alliance of top leaders of business and industry in Hancock, Harrison, and Jackson counties, was established to "address the common economic and business interests of the Mississippi Gulf Coast."[24] The Business Council finds purpose in working to "improve the business environment and promote the economic growth and development" in the counties on the Mississippi Gulf Coast in a post-Katrina atmosphere.[25] Since its formation, the Business Council has pushed for transportation improvements along the Coast, brought together the business communities from all three coastal counties, and lobbied lawmakers to extend GO Zone legislation to give investors "more time to take advantage of post Katrina development incentives."[26] Despite Hurricane Katrina, and thanks in great part to the efforts of Business Council members, members of similar counterpart organizations statewide, and Governor Haley Barbour's office, Mississippi "has seen a net increase of 38,000 new jobs in the last three years—a truly astonishing accomplishment considering that the hurricane put roughly 100,000 people out of work."[27]

Amid the immeasurable destruction and the ever-mounting challenge of recovery facing the Mississippi Gulf Coast and its surrounding areas, the necessity of rebuilding provides several unique opportunities for growth and improvement. Within weeks of Hurricane Katrina's landfall, a commission dedicated to the rebuilding and recovery effort was created. The commission, through the Mississippi Renewal Forum charrette process,[28] proposed "municipality-specific redevelopment plans,

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[24] Gulf Coast Business Council, Articles of Incorporation, Mar. 23, 2006, at 3, *available at* http://www.sos.state.ms.us/imaging/28961680.pdf.

[25] *Id.*

[26] *New Business Council to Become Post Katrina Voice* (WLOX television broadcast June 13, 2006) (transcript on file with author).

[27] *Mississippi: We're Open for Business*, FORTUNE, July 23, 2007, at S6.

[28] *See generally* Andrés Duany, *Mississippi Renewal Forum Summary Report: A Gulf Coast Renaissance*, http://www.mississippirenewal.com/documents/Rep_SummaryReport.pdf (last visited Feb. 6, 2008). Many of the nation's top architects and urban planners gave freely of their time and talents during the charrette process, for which the Mississippi Gulf Coast and its residents are eternally grateful.

primarily based on traditional town planning techniques."[29] The Commission recommended revamping zoning codes, utilizing the techniques of "mixed uses and context-based frontages and building heights,"[30] and implementing versions of the SmartCode.[31] Eleven coastal Mississippi municipalities participated in the charrette process, including: Bay St. Louis, Biloxi, d'Iberville, Gautier, Gulfport, Long Beach, Moss Point, Ocean Springs, Pascagoula, Pass Christian, and Waveland.[32] Although progress remains slow, the communities have seriously considered implementing the SmartCode, or at least some of its components.[33] While the charette process served as a stepping stone to rebuilding, much is left to accomplish in the years to come. However, there are some signs of recovery. The opening of two new bridges—the Bay St. Louis and Ocean Springs bridges—has "improved the quality of life for daily commuters" and reshaped the "silhouette of South Mississippi's landscape" in post-Katrina times.[34] It also has reconnected the three coastal counties along the shoreline, something notably absent since Hurricane Katrina.

In light of the challenges ahead, this Hurricane Katrina Special Edition publication is a reflection of the post-Katrina experience in Mississippi and its resultant legal issues. It contains articles by state leaders, practitioners, and members of

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[29] Chad D. Emerson, *Making Main Street Legal Again: The Smartcode Solution to Sprawl*, 71 MO. L. REV. 637, 678 (2006).

[30] *Id.* at 678-79.

[31] The SmartCode, developed by leading town planner Andrés Duany, codifies "traditional planning techniques that the New Urbanism movement currently advocates—techniques such as mixing uses, utilizing interconnected street networks, and designing compact, walkable, and environmentally-sustainable communities." Emerson, *supra* note 29, at 638. *See also* Andrés Duany & Emily Talen, *Making the Good Easy: The SmartCode Alternative*, 29 FORDHAM URB. L.J. 1445 (2002).

[32] Duany, *Mississippi Renewal Forum*, *supra* note 28, at 15.

[33] *See* Evelina Schmukler, *Board OKs SmartCode in Downtown, Takes Wait-And-See Stance on Other Areas*, GAZEBO GAZETTE, Jan. 18, 2008, at 1.

[34] Pam Firmin, *Top 10: Bridges, trees top landscape changes*, SUN HERALD, Dec. 24, 2007, at A1. The $266 million Bay St. Louis Bridge opened with two-lane traffic on May 17, 2007, and is scheduled to be fully open early in 2008. *Id.* The $338 million Ocean Springs Bridge opened to two-lane traffic on November 1, 2007, and is scheduled to be fully opened by mid-April 2008. *Id.*

the academic community. In addition to the issues incorporated in this foreword, included articles focus on the role played by education in both the short- and long-term recovery efforts of coastal communities; the effects of the 2005 Bankruptcy Code amendments on Gulf Coast residents; the legislative push for regulation of public adjusters; the climate of insurance after Hurricane Katrina and its effects of stymied rebuilding; the benefits of Gulf Opportunity Zone legislation; Hurricane Katrina's environmental impact on Mississippi; the contrast in available affordable housing before and after Hurricane Katrina; an international comparison; and the pro bono response involved in a model recovery plan. Included also is a comment from United States Representative Gene Taylor of Mississippi's Fourth Congressional District regarding his efforts to establish a multiple peril insurance system. Although invited to contribute prior to his resignation, former United States Senator Trent Lott was unable to participate due to previous commitments; this is unfortunate, given his personal experience of loss in the aftermath of Hurricane Katrina, his decades of dedicated service to the people of Mississippi, and his tireless efforts to facilitate the rebuilding effort along the Mississippi Coast.

Everyone who experienced Hurricane Katrina, even simply the far fringes of the storm, has a story. My story is that I am humbled by the strength, grace, and resiliency the people of the Mississippi Gulf Coast continue show in the face of disaster; it is that I am perpetually amazed by friends and neighbors who passed on FEMA trailers for weeks because someone else needed one more, those who still choose to consider themselves survivors rather than victims, those who now measure time in pre- and post-Katrina increments; it is that each time I revisit the shoreline and see the empty lots, vacant slabs, and steps leading nowhere I am met with a strong sense of loss for my beloved Gulf Coast; it is that I never took pictures of the devastation, hoping in time the images would be erased from my waking and sleeping consciousness; it is that I still have not forgiven myself for returning to the second week of my first year of law school while my family remained in our home on the beach in Pass Christian; it is that I have to believe renewal and

renaissance will take flight in time because the Coast and her faithful people will not accept defeat.

As the Mississippi Gulf Coast struggles to rebuild together—one brick at a time—this book shares the story of those affected by Hurricane Katrina, highlights the resilient spirit of recovery on the Mississippi Gulf Coast, and tells of lessons learned in the aftermath of the worst natural disaster in United States history. With humble appreciation for the opportunity of introducing this Hurricane Katrina Special Edition publication, it is dedicated to the people of the Mississippi Gulf Coast; to the survivors of Hurricane Katrina, those who battled wind and water and clung to life; in reverent memory of the many souls who perished in her fury; with gratitude to the thousands of volunteers who continue to give of their time, money, and talents, and without whose support recovery would be impossible; and to those everywhere whose lives were forever changed on August 29, 2005.

REBUILDING SCHOOLS, REBUILDING COMMUNITIES: THE CIVIC ROLE OF MISSISSIPPI'S PUBLIC SCHOOLS AFTER HURRICANE KATRINA

*Kristi L. Bowman**

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* Assistant Professor of Law, Michigan State University College of Law. This article is an excerpt of a chapter originally published in CHILDREN AND DISASTERS: WHAT WE HAVE LEARNED FROM THE HURRICANES OF 2005 (forthcoming 2008) and is reprinted with the permission of the Center for Children, Law & Policy at the University of Houston Law Center, and the American Bar Association Center on Children and the Law. Those two organizations hosted an outstanding conference in April 2007: "Children and Law After the Katrina Disaster: An Interdisciplinary Conference on Young Evacuees," at which an earlier version of this article was presented. This article also was presented at the 2007 Law and Society Association annual meeting and benefited from comments by fellow panelists and colleagues at both conferences.

I also am grateful to the University of Mississippi School of Law for providing support for on-site research in October 2006 during my year as a visiting member of that faculty; to the Michigan State University College of Law Library staff for exceptional research assistance by Joseph Dunn under the supervision of Jane Edwards and Barbara Bean; to University of Mississippi colleagues Debbie Bell, Tom Burnham, Susan Glisson, Andy Mullins, and Farish Percy for providing information about and contacts with Gulf Coast educators and community activists; to Kate Dennis and Alysson Mills for editorial assistance; and last but certainly not least to the following Mississippi educators for sharing their time and providing thoughtful reflections about the long arm of the storm and the recovery process: State Superintendent Hank Bounds, Pascagoula High School Guidance Counselor Herb Brown, Gulf Coast Education Initiative Consortium Executive Director Tom Clark, Mississippi Center for Justice attorney Kim Duffy, Gulfport School District Superintendent Glen East, Gulfport Assistant Director of Special Education Steve Huckabee, Bay St. Louis-Waveland Assistant Superintendent Becky Ladner, Gulfport Director of Special Education Martha Mullins, Harrison Central High School teacher Carol Rayburn, Jackson County School District Superintendent Rucks Robinson, Pascagoula School District Superintendent Wayne Rodolfich, and

> Schools like Second Street Elementary [in the Bay St. Louis-Waveland School District] have become the glue that holds this fractured community together.[1]

When public elementary and secondary schools in the six Mississippi Gulf Coast-area counties opened in August 2006, they enrolled ninety-two percent of the number of students they had before Hurricane Katrina made landfall just one year earlier.[2] Some of these students were Louisiana evacuees[3] and others were children of construction workers, but most were children who had lived in the area all along. The one-year return rate in Mississippi's Gulf Coast public schools varied among districts depending on the extent of damage,[4] but coastal Mississippi's return rate was nearly double New Orleans'. Although many of Katrina's lessons tell us what government did (or, more often, failed to do) with an unforeseen and heartbreaking level of ineptness, some lessons from Mississippi school districts—yes, from schools in a state known for having one of the most quantitatively weak public school systems in the country[5]—also can tell us what government did exceptionally well. After Katrina, Mississippi public school districts' herculean efforts to reopen public schools within a matter of weeks helped to anchor their communities and enable

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Pascagoula School District Assistant Superintendent for Administration Gary Tierce. Any errors are, of course, my own.

[1] *The News Hour with Jim Lehrer* (PBS television broadcast Apr. 6, 2006).

[2] Telephone Interview with Hank Bounds, State Superintendent of Educ. for Miss. (Aug. 2006). Three of these Mississippi counties—Hancock, Harrison, and Jackson—are directly on the coast and the three others—George, Pearl River, and Stone—are immediately to their north. Although all six counties suffered substantial damage from Katrina, the damage obviously was more dramatic for the three coastal counties. Thus, the comparison to New Orleans is not an apples-to-apples comparison.

[3] About ten percent of the displaced Louisiana residents took shelter in Mississippi. LOUISIANA RECOVERY AUTHORITY, HURRICANE KATRINA ANNIVERSARY DATA FOR LOUISIANA 2 (Aug. 20, 2006), *available at* http://www.lra.louisiana.gov/assets/LouisianaKatrinaAnniversaryData082206.pdf.

[4] *Compare The News Hour* (Apr. 6, 2006), *supra* note 1, *with The News Hour with Jim Lehrer* (PBS television broadcast Mar. 20, 2006).

[5] EDUC. WEEK RESEARCH CTR., MISSISSIPPI STATE INFORMATION (2006), *available at* http://www.edweek.org/rc/states/mississippi.html (last visited Dec. 5, 2006); Jimmie Covington, *State Raising Bar on Public Education*, MEMPHIS COMM. APPEAL, Sept. 30, 2006, at B6.

significant recovery to begin and then progress. This article chronicles that story.[6]

Although Katrina came ashore in Mississippi and the destruction of buildings and personal property there was described as "more complete" than in Louisiana,[7] Katrina-related media coverage and public attention focused heavily on New Orleans. I do not intend to suggest that some of the disproportionate focus is not justified; the sheer number of people who were stranded, who died, who were rendered homeless as a result of these disasters was substantially higher in New Orleans than in coastal Mississippi. Yet, no matter how many media accounts I read, the scope of the damage in Mississippi was incomprehensible to me until I saw it. Putting the damage in perspective, two weeks after Katrina a reporter wrote in the *New York Times*:

> If the levees had held in New Orleans, the destruction wrought on the Mississippi Gulf Coast by Hurricane Katrina would have been the most astonishing storm story of a generation. Whole towns have been laid flat, thousands of houses washed away and, statewide, the storm has been blamed for the deaths of 211 people, a toll far higher than those from Hurricanes Andrew, Hugo and Ivan.[8]

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[6] Vivian L. Gadsen and Susan Fuhrman write,

> While news reports highlight the conditions of these displaced children and families and, more recently, of the increased crime waves in cities such as Atlanta and Houston (described as a by-product of the relocation), fewer reports have addressed issues of education and schooling—either the efforts of the schools and school districts that now house the Gulf Coast region's displaced or the plans of local agencies in the Gulf Coast region to address the needs of displaced/returning students and their families. One can imagine that an assumption guiding current efforts is that once housing and other basic needs are addressed adequately, the reorganization of the schools and educational systems will follow. This assumption is problematic.

Reflections on Educational Equity in Post-Katrina New Orleans, *in* SHARON P. ROBINSON & M. CHRISTOPHER BROWN, THE CHILDREN HURRICANE KATRINA LEFT BEHIND 77 (2007). *See also* S. EDUC. FOUND., EDUCATION AFTER KATRINA: TIME FOR A NEW FEDERAL RESPONSE (2007); STENNIS INST. OF GOV'T, SPECIAL REPORT: A LOOK AT RECOVERY, ROLES, AND CAPACITY OF MISSISSIPPI COASTAL SCHOOL DISTRICTS STRUGGLING AND REBOUNDING AFTER HURRICANE KATRINA (2006).

[7] Jim Lewis, *Battle for Biloxi*, N.Y. TIMES MAG., May 21, 2006, at 100.

[8] Campbell Robertson, *Coastal Cities Of Mississippi In The Shadows*, N.Y. TIMES,

Recognizing what has happened in Mississippi is a crucial part of understanding Katrina's full impact as we reflect on the many aspects of this disaster, and also an important part of absorbing what lessons we can from Katrina and using that knowledge to plan better for future disasters.[9] As the Southern Education Foundation recognized, repairing and reopening public schools was often not a high priority for Federal Emergency Management Agency (FEMA) officials.[10] We must not allow that mistake to be repeated.

I. THE COASTAL MISSISSIPPI PUBLIC SCHOOLS: BEFORE KATRINA, AND KATRINA'S DAMAGE

In the years leading up to Katrina, the Mississippi Gulf Coast schools had been gaining ground. The region had become known as one of Mississippi's stronger, educationally speaking. The current state superintendent came directly from the superintendency of one of the coastal districts,[11] as did his predecessor. The region's schools were supported by an upward-trending tax base[12] in what is for the most part a very property-poor state.[13] During the 1990s, the gaming industry took root along coastal Mississippi, eventually leading to the opening of at least a dozen off-shore casinos which brought about 30,000 jobs to the area and hundreds of millions of dollars in state and local tax revenues every year—the "Mississippi Miracle."[14] The

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Sept. 12, 2005, at 1A.

[9] RAND Gulf States Policy Institute, *Fact Sheet, Preparing for Future Floods: Analyzing Reconstruction Pathways from Past Floods Can Help* (2006).

[10] S. EDUC. FOUND., EDUCATION AFTER KATRINA, *supra* note 6, at 20.

[11] *Available at* http://www.mde.k12.ms.us/MDEDirectory/Superin.htm.

[12] "[A]lmost all school districts on the Mississippi coast had healthy budgets and test scores above the state average. Half of Mississippi's coastal schools were ranked by the state as 'exemplary' or 'superior.'" S. EDUC. FOUND., EDUCATION AFTER KATRINA, *supra* note 6, at 7.

[13] *See generally* Sharon D. Wright Austin, THE TRANSFORMATION OF PLANTATION POLITICS 61-66 (2006); Heifer Foundation, *North America: Mississippi Delta Endowments* (2007), *available at* http://www.heiferfoundation.org/waystogive/country/northamerica/MississippiDelta.cfm; Debbie Elliott, *Reviving Mississippi Delta a Long, Slow Process*, All Things Considered (NPR braodcast June 7, 2005), *available at* http://www.npr.org/templates/story/story.php?storyId=4679733.

[14] *The News Hour with Jim Lehrer* (PBS television broadcast Oct. 17, 2005); *The*

growing commercial tax base supplemented the residential tax base, which included some stately beachfront homes such as Senator Trent Lott's.[15] An Atlanta doctor who moved to Mississippi during the recovery described pre-Katrina Mississippi as "an up-and-coming place. This wasn't the Mississippi of the history books. [Before Katrina, it] was casinos, resorts, high-tech. In a state with awful schools, the schools here were pretty good."[16]

Then Katrina hit. The more-than-thirty-foot storm surge retreated within a matter of hours from most of Mississippi.[17] State officials estimated that about six percent, or 30,000, of their public school students were displaced by Katrina.[18] The United States Department of Education reported that, across the region, over one thousand schools were closed for at least two weeks.[19] The Southern Education Foundation described this as the largest displacement of students from schools since the Great Depression.[20] Eventually, Katrina resulted in deaths of 231 Mississippians[21] and 1464 Louisiana residents.[22] About three hundred Mississippi public schools were severely damaged, including twenty-four that were destroyed.[23] Mississippi Gulf Coast public schools also lost 150 buses.[24] State

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News Hour with Jim Lehrer (PBS television broadcast Aug. 25, 2006); Robertson, *Coastal Cities*, *supra* note 8, at A1.

[15] *Available at* http://www.cnn.com/2005/POLITICS/08/30/katrina.lott.

[16] Claudia Dreifus, *Attending to Sick Children Along a Gulf Coast Still in Tatters*, N.Y. TIMES, Nov. 21, 2006, at F2.

[17] Lewis, *Battle for Biloxi*, *supra* note 7, at 100.

[18] Bounds Interview, *supra* note 2; Irwin Redlener, *Orphans of the Storm*, N.Y. TIMES, May 9, 2006, at A27. During the 2004-2005 school year, 495,376 students were enrolled in Mississippi public schools. National Center for Education Statistics, *State Education Data Profiles* (data taken from the Common Core of Data), *available at* http://nces.ed.gov/programs/stateprofiles/sresult.asp?mode=short&s1=28.

[19] U.S. Dep't of Educ., *Helping Gulf Coast Students Read and Succeed* (Apr. 2007), *available at* http://hurricanehelpforschools.gov/030206-factsheet.html.

[20] S. EDUC. FOUND., EDUCATION AFTER KATRINA, *supra* note 6, at 3.

[21] Joshua Norman, *Toward a Comprehensive Death Count*, SUN HERALD, Nov. 18, 2006, at A9.

[22] La. Dep't of Health and Hosps., *Reports of Missing and Deceased* (Aug. 2, 2006), *available at* http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248.

[23] Bounds Interview, *supra* note 2.

[24] Covington, *State Raising*, *supra* note 6, at B6.

Superintendent Hank Bounds estimated that the total damage suffered by Mississippi public school districts exceeded $800 million[25]—when a hurricane strikes, it is not only buildings that need repair, but also desks, chairs, textbooks, libraries, technology, and other equipment that often must be replaced in their entirety.

After Hurricanes Katrina and Rita hit, the federal government allocated approximately $750 million in elementary and secondary school restart funding to supplement FEMA and state-based emergency relief funding.[26] Louisiana received $445.6 million of this total; Mississippi, $222.8 million (distributed to thirty-eight school districts); Texas, $78.2 million; and Alabama, $3.8 million. The federal government also provided impact aid to school districts in the region and across the country that absorbed the displaced students from the coast.[27] In Mississippi, this impact aid was supplemented by a five-million dollar investment by the Bill & Melinda Gates Foundation.[28]

II. MISSISSIPPI'S RECOVERY

A. Mississippi Schools' Role in Providing Emergency Relief

In the days following the storm, displaced residents' most acute physical needs were food and housing. A number of public schools in the Gulf Coast region survived well enough to serve as emergency shelters until the days, or more often weeks, when FEMA trailers arrived.[29] During this time, some residents were

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[25] Bounds Interview, *supra* note 2.

[26] Alyson Klein, *Schools Get Katrina Aid, Uncertainty*, EDUC. WEEK 1, 29 (Mar. 29, 2006).

[27] *Id.*

[28] Press Release, Miss. Dep't of Educ., *New Investment to Help Improve Quality of Education for Mississippi Students and Schools Affected by Katrina* (Dec. 16, 2005), *available at* http://www.mde.k12.ms.us/extrel/news/Gates%20Foundation%20Grant.htm.

[29] Interview with Rucks Robinson, Jackson Co. Sch. Dist. Superintendent, in Vancleave, Miss. (Oct. 20, 2006). Many religious communities and community organizations (such as the Girl Scouts) also provided their facilities for use as emergency shelters. *See* http://www.arkansasoutreach.com/arkansas_katrina_emergency_shelt.htm.

able to make arrangements to live with friends or family members, others decided to leave the area, and many remained in need of emergency shelter. The emergency shelter provided by the schools was invaluable; yet, allowing schools to be used as large-scale shelters was not cost-free to the educational process. The occupancy of the schools and then the necessity of cleaning them inevitably pushed back the date by which the schools could be ready to reopen.[30]

The idea of using schools as emergency shelters is hardly novel—indeed, California disaster plans, anticipating earthquakes, identify school buildings as sites for emergency shelters.[31] This makes a good deal of sense: in most communities, the largest government buildings open to the public are city and county administrative offices, public libraries, community activity centers, courthouses, and public schools.[32] Of these, schools often have the most open or potentially open space in which cots can be set up because of their gymnasiums and lunchrooms, and also because student desks in most classrooms are fairly easy to move, compared to cubicles and office furniture. School buildings also have large kitchen and restroom facilities. Additionally, most "official" government buildings are concentrated in one area in a community, whereas schools are more dispersed throughout a community.[33] A city center might be hit hard (as in Pascagoula,

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[30] Robinson Interview, *supra* note 29; Vicki Smith, *Officials Plan to Move Evacuees From Some Schools; Showers Arrive*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 14, 2005.

[31] Ted Nordhaus & Michael Shellenberger, *Preparing for Nature's Attack*, N.Y. TIMES, Apr. 1, 2005, at A15.

[32] State and federal jails and prisons also are on this list, but many communities in hurricane-threatened areas seem to make a practice of evacuating inmates to safer ground when a potentially serious storm is approaching. State of La., Dep't of Pub. Safety & Corrections, Office of the Secretary, *A Short Story About Resourcefulness, Courage, and Two Hurricanes* (date unclear). However, this practice may not have been followed in New Orleans. *See* Human Rights Watch, *Officers Deserted a Jail Building, Leaving Inmates Locked in Cells*, Human Rights News (Sept. 22, 2005); Olenka Frenkiel, *Prisoners of Katrina* (BBC broadcast Aug. 13, 2006).

[33] Sara Frye, *School May Double as Hurricane Shelter*, MISS. PRESS, June 26, 2007 (noting the absence of shelters in west Jackson County, one of the three Mississippi counties directly on the Gulf, and the school district's attempts to have a new school in that area designated as an approved emergency shelter).

Mississippi), destroying many of the local government offices, or it might be spared the brunt of the disaster. But because natural disasters vary in their effects from one community to the next and even within communities as well,[34] the public buildings most likely to be standing in any community after a disaster, and thus usable as emergency shelters, are public schools and community centers—and the former outnumber the latter significantly.

Thus, during the few weeks immediately after Katrina and sometimes for several months, school buildings in Mississippi and Louisiana housed many of the 230 emergency shelters the Red Cross opened in six states across the South.[35] Some of these schools functioned as temporary headquarters for relief workers and for displaced local municipal government offices including the police, as well.[36] (Out of necessity, some residents created shelters in schools that were not approved as shelter facilities.[37]) As weeks turned to months and groups of volunteers came to the area, they, too often were provided shelter in school gyms and in

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[34] *See generally* National Oceanic and Atmospheric Administration, *Hurricane Basics* (1999), *available at* hurricanes.noaa.gov/pdf/hurricanebook.pdf (last visited Dec. 5, 2006).

[35] Kate Zernike and Jodi Wilgoren, *Hurricane Katrina: The Displaced*, N.Y. TIMES, Aug. 31, 2005, at A1; *see also* Scott Canon, *Displaced Hurricane Survivors Move Into New Shelters*, SUN HERALD, Sept. 18, 2005 (Mississippi school shelter); Smith, *Officials Plan*, *supra* note 31 (Mississippi school shelter); Rick Lyman and Susan Saluny, *Still Sheltered, Evacuees Take a Longer View*, N.Y. TIMES, Sept. 22, 2005, at A1 (Louisiana school shelters); Jodi Cararas, *Northshore Harbor Center in Slidell to Become Temporary Home for Over 600 Displaced Residents*, NEW ORLEANS CITY BUSINESS, Sept. 29, 2005; Charlie Chapple, *Shelters Are Being Moved From St. Tammany Schools; Classes Are Expected to Resume on Oct. 3*, TIMES-PICAYUNE, Sept. 22, 2005, at B05.

[36] For example, the Jackson County school district's administrative office building housed various local municipalities, as did the Pascagoula High School. Robinson Interview, *supra* note 29; Interview with Wayne Rodolfich, Pascagoula Sch. Dist. Superintendent, in Pascagoula, Miss. (Oct. 20, 2006); Rob Nelson, *Habans Elementary Becomes Staging Area; School Becomes Officers' Home Away From Home*, TIMES-PICAYUNE, Sept. 29, 2005, at 99 (Louisiana school used as headquarters and emergency shelter for over 150 police officers).

[37] *See, e.g.*, Alan Huffman, *Katrina: The Aftermath: Folk seize reins, act as own rescuers*, ATLANTA JOURNAL-CONSTITUTION, Sept. 25, 2005, at 3C; Vicki Smith, *Mississippi Town is Seemingly Forgotten in Katrina Recovery*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 20, 2005.

churches.[38]

Now looking forward, at least two Mississippi coastal school districts are attempting to have more of their school buildings approved for future use as emergency shelters.[39] In at least one situation, a school district petitioned the Mississippi Emergency Management Authority (MEMA, the state's counterpart to FEMA) to designate a school awaiting rebuilding as an emergency shelter. If such an application is approved, the school receives additional funding from MEMA to be used in the building's construction so that the facility meets the more rigorous standards for approved emergency shelters: having emergency backup utilities and a roof and exterior design that are able to withstand two-hundred-mile-per-hour winds.[40] The community would benefit by gaining an emergency shelter in an area currently lacking one, and by having a school likely to need less future repair. As well, at least one Mississippi school district agreed to loan out its buses to evacuate local residents to Red Cross shelters in the central part of the state, should the need arise.[41] And, the Mississippi department of education plans to donate warehoused USDA food supplies to shelters when another emergency situation occurs.[42]

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[38] *See, e.g.*, Interview with Glen East, Gulfport Sch. Dist. Superintendent, in Gulfport, Miss. (Oct. 19, 2006); Abigail Sullivan Moore, *Spring Break Destination: The Land of Hurricane Katrina*, N.Y. TIMES, Mar. 5, 2006, at 11. The contributions by faith communities across the country have been substantial, and some have described this level of activity as "the largest faith-based disaster response in the nation's history." *See, e.g.*, Sean Mussenden, *Storm Aid's a Mission: Virginians Join Faith-Based Disaster Response Called Largest Ever*, RICHMOND TIMES DISPATCH, Oct. 22, 2005, at A4; Ben Caldwell, *Church Volunteers Helping with Flood Relief*, CHARLESTON GAZETTE, Oct. 26, 2005, at 1; *Idaho Churches Offer Cars, Housing, and Jobs to Katrina Refugees*, ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 16, 2005; *Good Works: Hurricane Aftermath*, ATLANTA JOURNAL-CONSTITUTION, Sept. 24, 2005, at 5F.

[39] Frye, *School may double*, *supra* note 33.

[40] *Id.*

[41] *Jackson County Offers Free Bus Evacuation This Hurricane Season* (WLOX television broadcast June 25, 2007).

[42] Brad Kessie, *Hurricane shelters discussed at meeting* (WLOX ABC 13 television broadcast May 30, 2007), *available at* http://www.wlox.com/Global/story.asp?S=6582271.

B. Mississippi Schools' Role in Short-Term Recovery

At the same time Mississippi school districts were helping to address their communities' immediate needs, school administrators began the difficult work of reopening schools. Most (if not all) of the Mississippi Gulf Coast area superintendents remained in the region during the storm.[43] They began work to reopen schools within days of Katrina's landfall, when roads were still blocked by so much debris that often they were impassable.[44]

In the years leading up to Katrina, Mississippi school district superintendents from the Gulf Coast region had become better acquainted with one another through meetings and activities of the Mississippi Gulf Coast Education Consortium.[45] After Katrina, they utilized that existing organizational structure, working together and often sharing information about the progress of insurance claims, FEMA and MEMA agents and programs, and various aspects of the recovery effort.[46] Two days after Katrina, these superintendents convened at a meeting of the Consortium in Biloxi and began their post-Katrina cooperation. Fourteen months after Katrina when I attended a Consortium meeting, their camaraderie was evident.

Whether they realized it or not, many of the Mississippi Gulf Coast superintendents were united by shared assumptions about the ways in which schools could help anchor their communities in the short- and long-term as the hard work of rebuilding progressed. First, if school was back in session, parents and children in the community would have some sense of stability and familiarity for several hours a day during an otherwise chaotic existence.[47] Natural disasters like Katrina cause extraordinary levels of stress on individuals, and

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[43] Telephone Interview with Tom Clark, Executive Dir. of the Gulf Coast Educ. Initiative Consortium (Oct. 2006).

[44] *See, e.g.*, Robinson Interview, *supra* note 29.

[45] Clark Interview, *supra* note 43.

[46] Kim Stasny, *Who Was Not Touched?*, *in* BAY WAVELAND SCHOOLS ONE YEAR REPORT (Fall 2006).

[47] *See, e.g.*, Telephone Interview with Kim Duffy, Atty. for Miss. Ctr. for Justice and parent of school-aged children (Oct. 27, 2006).

especially on children.[48] After a disaster, the more children are able to return to a familiar routine, even if only in school, the more manageable the disruptions to their lives become.[49] (For high school students especially, those who do *not* attend school regularly after such a large-scale disaster are more likely to become permanent dropouts.[50]) Having school back in session was a daily event with a significance that was almost tangible. As one parent and community organizer explained, "the day my kids went back to school was when we knew things would be normal again."[51]

Second, having schools—especially good schools—back in session also meant that in many cases, families would be more likely to stay in the community or return to it.[52] During the weeks and months after Katrina, parents were battling the bureaucracy of insurance companies and FEMA; attempting to

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[48] *See, e.g.*, Kenneth B. Wells and Greer Sullivan, *Healing Storm Victims' Mental Health*, NEWSDAY, Oct. 3, 2005.

[49] Lewis Aptekar, *The Emotional Effects of Disaster on Children: A Review of the Literature*, 19 INT'L J. OF MENTAL HEALTH 77 (1990); Gretchen Hoffman, *School can Help Displaced Students Cope*, PASADENA STAR-NEWS, Sept. 17, 2005; Emma Daly, *Helping Students Cope With a Katrina-Tossed World*, N.Y. TIMES, Nov. 16, 2005, at B3.

[50] In early November 2005, the Louisiana Department of Education estimated that about 20,000 children were, because of Katrina, not attending school anywhere. *The News Hour with Jim Lehrer* (PBS broadcast Nov. 1, 2005); Shelia Dewan, *For Many, Education Is Another Storm Victim*, N.Y. TIMES, June 1, 2006, at A16. A study conducted about six months after Katrina concluded that of a group of New Orleans evacuees dispersed throughout southern Louisiana, "nearly one in four school-age children is either not enrolled in school or misses 10 days of class every month. Many who do attend school in their temporary host communities find the classrooms overcrowded, the staff exhausted and stress levels unbearably high." Redlener, *Orphans*, *supra* note 18, at A27.

[51] Duffy Interview, *supra* note 47; *see also* STENNIS INST. OF GOV'T, SPECIAL REPORT, *supra* note 6, at iv.

[52] Shelia Dewan et al., *Evacuees' Lives Still Upended Seven Months After Hurricane*, N.Y. TIMES, Mar. 22, 2006, at A1; Leslie Eaton, *10,000 Get Grant Letters On Rebuilding in Louisiana*, N.Y. TIMES, Dec. 1, 2006, at A24; Leslie Eaton, *Hurricane Aid Finally Flowing to Homeowners*, N.Y. TIMES, July 17, 2006, at A1; Matt Fellowes et al., *The State of New Orleans: An Update*, N.Y. TIMES, July 5, 2006, at A17; New York Times Editorial Board, *Editorial: Still Battering the Katrina Homeless*, N.Y. TIMES, Apr. 29, 2006, at A10; Gary Rivlin, *New Orleans Commission to Seek Overhaul of Schools and Transit*, N.Y. TIMES, Jan. 11, 2006, at A1; Duffy Interview, *supra* note 47; *News Hour*, Nov. 1, 2005, *supra* note 50 (describing New Orleans in early November 2005 as "virtually childless").

get help from the Red Cross and other relief agencies; and trying to return to work or seek new employment with FEMA or other employers. When schools were open, parents could be comfortable with the knowledge that while they attempted to hold their families' lives together economically, their children would be supervised for several hours every day.[53] Additionally, those parents employed by school districts would receive paychecks. Because, like students, not all teachers and staff returned, some school districts were able to promise all teachers and staff who stayed that they would not be laid off during that school year.[54] The economic impact of reopening or creating good schools extends beyond the jobs it provides for teachers and staff, though: as education researchers Paul Hill and Jane Hannaway have written, "re-emerging or new businesses will be able to attract high-caliber workers only if the schools their children can attend are good."[55]

Third, when schools reopened, they could care for their students in a variety of ways. Many districts' administrators worked with state authorities to have all of their students declared eligible for free and reduced meals, thus enabling schools to provide students one or two hot meals per day at no cost to their families. For some students, these were the first hot meals they had eaten since the hurricane hit six weeks earlier.[56] Providing for children in this way bolstered parents' efforts to rebuild families' lives. As the next section will discuss, too, when school was back in session, teachers and staff could supplement the efforts of parents and help these children start

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[53] *New Orleans School Maintains High Standards in the Aftermath of Hurricane Katrina*, ACHIEVER 1 (Oct. 1, 2006); *see also* STENNIS INST. OF GOV'T, SPECIAL REPORT, *supra* note 6, at iv.

[54] *See, e.g.*, Rodolfich Interview, *supra* note 36; Robinson Interview, *supra* note 29. In early 2006, New Orleans announced that over 7,500 employees would be laid off and their health benefits terminated. Sharon Porter Robinson & Penny Engel, *Creating World-Class Teachers: Prospects for Katrina Recovery and Beyond*, *in* ROBINSON & BROWN, *supra* note 6, at 153.

[55] Paul Hill & Jane Hannaway, *The Future of Public Education in New Orleans*, AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE *NEW* NEW ORLEANS 5 (Jan. 2006).

[56] *See, e.g.*, Robinson Interview, *supra* note 29; U.S. Dep't of Agric., *Emergency Feeding of School Children in Areas Devastated by Hurricane Katrina* (Aug. 31, 2005).

to come to terms with the disaster.[57]

The superintendents' local efforts and regional coordination were strongly supported at and reinforced by the state-level educational administration, as well. Researchers who have written about Mississippi's recovery have noted the high level of intra- and inter-governmental communication. The connection between the affected school districts and the state board of education exemplifies this. In addition to focusing on these problems from the state capitol complex in Jackson, Mississippi, the state superintendent made numerous visits to the Gulf Coast, maintaining a high level of communication with the local district superintendents.[58]

In total, forty-six Mississippi public school districts closed after Katrina hit on August 29, 2005.[59] Thirty-nine of these districts reopened within one month, many of those within just a couple of weeks.[60] Of the remaining seven districts, most reopened in early- to mid-October 2005, and the last, the Bay St. Louis-Waveland district located where the storm hit the coast most directly, reopened in early November 2005.[61] In many school districts, classes were held in some of the 466 mobile classroom units requested as a result of hurricane damage for days and weeks; in other districts, classes were being held in mobile units two years after Katrina.[62]

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[57] *See also* Margie Hunter, *Schools Take in Displaced Students* (CNN television broadcast Sept. 7, 2005); Margie L. Kiter Edwards, *An Interdisciplinary Framework on Disasters and Stress: The Promise of an Ecological Framework*, 13 SOC. F. 115, 120 (1998); STENNIS INST. OF GOV'T, SPECIAL REPORT, *supra* note 6, at iv.

[58] For at least two and a half months after Katrina, State Superintendent Hank Bounds turned the state board administration's energies to Gulf Coast recovery around the clock. Bounds Interview, *supra* note 2; STENNIS INST. OF GOV'T, SPECIAL REPORT, *supra* note 6, at xii-xiv.

[59] Miss. Dep't of Educ., Katrina Recovery Information, *School Opening Dates* (2005), *available at*: http://www.mde.k12.ms.us/Katrina/opening.html.

[60] *Id.*

[61] *Id.*

[62] STENNIS INST. OF GOV'T, SPECIAL REPORT, *supra* note 6, at xi.

C. *Katrina's Impact on Local Funding for Education in Mississippi*

As education officials were working to reopen schools, they also needed to think about how their districts—funded in large part by property taxes—were going to cover their own costs in the coming months and years. Much of their tax base had been washed out to sea or otherwise decimated, and per-pupil allocations from the state could vary considerably in the future, depending on students' rate of return. About thirty percent of Mississippi public school funding comes from local tax revenue, generally a combination of commercial and residential property tax and also sales tax.[63] Federal funding was intended to help damaged districts cover temporary costs associated with reopening a school district or to assist districts in educating displaced students, not to provide for rebuilding or to counter the effects on the property tax base.[64] And, in the years leading up to Katrina, local districts had to dip into their own coffers because education was not "fully funded" in Mississippi until 2007; as a result, local districts did not enter into Katrina with substantial reserves.[65]

Before Katrina, the biggest commercial players on the Mississippi Gulf Coast were the casinos, a few large

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[63] Handout from Andrew Mullins, Executive Assistant to the Chancellor and Assoc. Prof. of Educ., Univ. of Miss. (2006) (on file with author) .

[64] U.S. Dep't of Educ., *Helping Gulf Coast Students*, *supra* note 19 (reporting that over $750 million of federal aid was provided pursuant to the Immediate Aid to Restart School Operations Program); Michelle R. Davis, *Democrats Seek Education Dept. 'Recovery Czar'*, EDUC. WEEK, May 3, 2006; Michelle R. Davis, *Gulf Coast Districts Get Restart Aid, But Ask Whether It Will Be Enough*, EDUC. WEEK, Mar. 29, 2006, at 28; Klein, *Schools*, *supra* note 26, at 1, 28.

[65] This is what is meant by education in Mississippi being "fully funded" or not: the state established an education funding scheme under which the state would contribute more to particularly poor districts, if those districts were taxing themselves at a certain level and still could not generate a certain per-pupil expenditure. The funding scheme was the result of an innovative approach led in the mid-1980s by Governor William Winter. But, similar to having a line of credit and not using it all, the state would authorize its own ability to allocate a certain level of funding, but then not actually approve that level of funding when it came time to balance the budget. Bounds Interview, *supra* note 2; Robert C. Johnston, *Education Budget to See Increase*, EDUC. WEEK, June 7, 2006.

manufacturers such as shipbuilder Northrop Grumman, and nationwide chain stores including Home Depot and Wal-Mart.[66] After Katrina, the state government was quick to recognize the role of casinos in strengthening the pre-Katrina Gulf Coast economy. Even anti-gaming Governor Haley Barbour strongly supported the legislative resolution that allowed casinos to be built for the first time onshore (as opposed to offshore on floating barges or riverboats) as long as they were within eight hundred feet of water.[67] This concession allowed casino rebuilding to commence even more quickly because the casinos could construct buildings that were more likely to withstand future storms. Thousands of construction jobs were created within weeks after Katrina.[68] Many casinos were able to open within several months; one year after Katrina, 13,000 of the former 15,000 jobs in the casinos had returned.[69] In the twenty-two months following Katrina, the casinos invested almost $1.5 billion to rebuild their businesses on the Mississippi Gulf Coast.[70] Their investment paid off: as the second anniversary of Katrina approached, Mississippi casinos were generating all-time revenue highs,[71] and also putting money back into local school districts' coffers via local tax revenue.[72]

Similarly, shipbuilder Northrop Grumman, the state's largest private employer, maintained its presence on the coast although its workforce shrunk by nearly ten percent, apparently because of a shortage of skilled labor.[73] Not all large commercial

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[66] *See, e.g.*, Robertson, *Coastal Cities*, *supra* note 8.

[67] *News Hour*, Aug. 25, 2006, *supra* note 14.

[68] George Penick & K. Jack Riley, *Mississippi Comeback*, L.A. TIMES, Aug. 20, 2006.

[69] Kathy Hanrahan, *Miss. Coast Casino Employees Returning, Still Face Challenges*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 9, 2006.

[70] *Vendors Excited About Post Katrina Casino Resurgence* (WLOX broadcast July 3, 2007).

[71] Gary Rivlin, *Casinos Booming in Katrina's Wake as Cash Pours In*, N.Y. TIMES, July 16, 2007.

[72] *News Hour*, Aug. 25, 2006, *supra* note 14.

[73] Debbie Elliott, *Gulf Coast Economics Reshaped by Katrina*, All Things Considered (NPR broadcast May 26, 2007); Geoff Pender, *Coast's Economic Outlook Positive: Rebuilding Efforts Boosting Economy*, SUN HERALD, Dec. 27, 2006.

enterprises stayed on the Mississippi Gulf Coast.[74] But, when "big box" stores reopened, the impact on the local economy was almost palpable, not only because these stores could provide inexpensive food, clothing, and general drugstore items (Wal-Mart) or construction materials (Home Depot, Lowes), but also because a not-insignificant amount of the commercial tax base returned without years of delay.[75] And, in a few districts, unusual circumstances made the funding impact more tolerable. For example, because Katrina destroyed an estimated half-million vehicles all along the Gulf Coast region[76] and car insurance companies paid out on claims comparatively quickly, car dealerships in the area were able to sell non-flood-damaged cars almost as fast as they could get them in stock. For school districts with car dealerships in their boundaries this was a boon.[77]

Not all school districts had a substantial commercial component to their local tax base, though. For example, Katrina's ground zero spanned the neighboring, heavily residential Bay St. Louis and Waveland communities and the one school district that ties them together. That school district's superintendent estimated that about sixty percent of the tax base from Bay St. Louis was completely destroyed, and ninety-

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[74] Vacuum manufacturer Oreck Corporation left for Tennessee, and in Pass Christian neither the community's only Wal-Mart nor its Winn Dixie grocery store had been rebuilt nearly two years after Katrina, although plans to rebuild the Wal-Mart existed at the time this went to press. Debbie Elliott, *Katrina Still Bad for Business in Pass Christian*, All Things Considered (NPR broadcast May 27, 2007); Elliott, *Gulf Coast Economics*, *supra* note 73.

[75] In some towns, a few large businesses can make up most of the property and/or sales tax base: for example, in the small town of Pass Christian, before Katrina the Wal-Mart and Winn Dixie grocery store accounted for seventy-five percent of local sales tax revenue. Melissa Block, *Mississippi Mayor Hails Return of Wal-Mart*, All Things Considered (NPR broadcast Mar. 1, 2007) (quoting Pass Christian, Mississippi, Mayor Leo McDermott); *News Hour*, Mar. 20, 2006, *supra* note 4; Anne D'Innocenzio, *Home Depot and Lowe's Plan Big Role In Rebuilding Of Gulf Coast*, ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 17, 2005.

[76] Tamara Lush, *Hurricane's Scars Will Linger on Cars*, ST. PETERSBURG TIMES, Nov. 27, 2005, at 1B.

[77] The Jackson County school district was one of these. In fall 2006, it anticipated almost covering the drop in property tax revenue with tax revenue from the sale of thousands of vehicles. Robinson Interview, *supra* note 29.

two percent from Waveland. Before Katrina, Waveland had a population of 10,000; one year later, it had only 2,500 residents and, none of the forty-one businesses had returned.[78] Even the local municipalities in Bay St. Louis and Waveland, with the exception of the schools and the school district administration, were relocating as far inland (and thus away from the former cities' centers) as they could.[79] Fourteen months after Katrina, the local government offices and school district administration all were run out of trailers in the middle of their communities, a situation that did not appear likely to change anytime soon.[80]

Yet, one year after Katrina, it appeared that property near the beach had quadrupled in value in Biloxi,[81] and even destroyed homes in Bay St. Louis and Waveland reportedly were valued at a significantly higher rate than before the hurricane damaged them.[82] To an extent this is counterintuitive: many homes apparently were worth more in an uninhabitable or barely habitable post-Katrina state than they were before; the costs of rebuilding spiked, particularly considering newly revised building codes; and insurance costs skyrocketed if insurance was even available.[83] Interestingly, it appears that these rising property values can be explained mainly by two factors: first, the demand for housing far exceeds the supply. On the Mississippi Gulf Coast alone, 65,000 homes were completely destroyed[84] and in response to the shortage, rental costs often doubled.[85] Second, speculators and developers are buying up a not-insignificant portion of land that has not been available for decades, some

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[78] *News Hour*, Aug. 25, 2006, *supra* note 14.

[79] Interview with Becky Ladner, Bay St. Louis-Waveland Sch. Dist. Assistant Superintendent, in Bay St. Louis, Miss. (Oct. 19, 2006).

[80] *Id.*; *News Hour*, Aug. 25, 2006, *supra* note 14.

[81] *News Hour*, Aug. 25, 2006, *supra* note 14.

[82] Ladner Interview, *supra* note 79.

[83] In mid-2007, State Farm announced that it will not issue any new homeowners insurance policies in the entire state of Mississippi. Elliott, *Gulf Coast Economics*, *supra* note 73; Debbie Elliott, *State Farm Moves Provoke Insurance Debate*, All Things Considered (NPR broadcast Feb. 17, 2007); Madeline Brand, *'Marketplace' Report: Gulf Coast Insurance*, Day to Day (NPR broadcast Feb. 15, 2007).

[84] *News Hour*, Aug. 25, 2006, *supra* note 14.

[85] Alix Spiegel, *Stuck and Suicidal in a Post-Katrina Trailer Park* (NPR broadcast Aug. 29, 2007).

with an eye towards creating upscale condo developments.[86] Some residents fear the dynamics could lead to "the largest transfer of property since the Great Depression."[87]

On one hand, this increase in property values could substantially benefit local school districts because districts receive a large portion of their funding from local property taxes (assuming that owners can be found and can and will pay taxes on the higher, reassessed value of their property). But, an increase in property value also could serve to push long-time residents out of the area if they cannot afford to rent housing or to buy, rebuild, and/or pay higher property taxes—as many now cannot.[88] Stated more bluntly, this effect could push many working-class and middle-class families and their children out of school districts that may in the near future have more revenues to spend on education after the bulk of Katrina recovery is completed. This is not to say that these school districts will have per-pupil spending rates anywhere near the nation's highest,[89] or that the Mississippi Gulf Coast will "gentrify" overnight; many factors operate to deter such an effect.[90] Yet, it seems quite likely that the demographic profile of the region's students will change substantially.[91] However, at the time this

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[86] Elliott, *Gulf Coast Economics*, *supra* note 73.

[87] Elliott, *Katrina Still Bad for Business*, *supra* note 74.

[88] *See generally* Melanie Peeples, *Hurricane Season Sparks Survival Training*, Morning Edition (NPR broadcast June 11, 2007); Elliott, *Gulf Coast Economics*, *supra* note 73; Spiegel, *Stuck and Suicidal*, *supra* note 85.

[89] Mississippi consistently ranks at or near the bottom of all fifty states and the District of Columbia in per-pupil spending. *See, e.g.*, Nat'l Ctr. for Educ. Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2002-2003, Table 5: Student Membership and Current Expenditures Per Pupil in Membership for Public Elementary and Secondary Schools, by Function, State, and Outlying Areas: School Year 2002-2003* (Oct. 2005), *available at*: http://nces.ed.gov/ccd/pubs/npefs03/findings.asp#3.

[90] Among these factors are that the rate of construction is slow and also that families often are reluctant to move elsewhere even if, like a reported 100,000 people in Mississippi, they still lived in FEMA trailers one year after Katrina because many of them could not afford the significantly higher post-Katrina rental prices across the region. Hanrahan, *Miss. Coast Casino Employees*, *supra* note 69; Spiegel, *Stuck and Suicidal*, *supra* note 85.

[91] For example, the housing shortage and resulting skyrocketing rental prices reportedly have driven out many low-income families. Especially in New Orleans,

article went to press, extensive demographic information was available only for the 2005-2006 school year, the year in which Katrina hit.[92]

D. Addressing Students' Mental Health Needs in Mississippi

Perhaps one of the greatest lessons we can learn from Katrina is that functioning schools create an unparalleled opportunity to provide mental health services to children after such a disaster. Understandably, when providing food and shelter for one's children are real, daily concerns for parents, and when securing funding and labor to repair and rebuild basic school facilities lead the list of superintendents' priorities, attending to students' mental health needs can seem like a luxury. But, because schools can provide a substantial normalizing force in students' lives merely by holding classes,[93] it is important to recognize the positive impact that schools can have on students' mental health at a crucial point in time—and to take advantage of this unique opportunity.[94] As psychiatrists Kenneth B. Wells and Greer Sullivan have written, "mental

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African-Americans are disproportionately poor. And the construction boom has brought a substantially higher number of Latino children to the area as those children travel with their families, creating the possibility that districts may have increasing numbers of children with limited English proficiency. Spiegel, *Stuck and Suicidal*, *supra* note 85.

[92] Hundreds of thousands of families with school-age children remained in transition during that school year and data often was reported at non-standard times out of practical necessity. School districts' enrollments (particularly in New Orleans, where families and children were slower to return) varied wildly throughout that school year.

[93] *News Hour*, Apr. 6, 2006, *supra* note 1 (School "has been like therapy to me," said Principal Ricky Reed, and "an escape" for students, as well.); *see generally* Aptekar, *The Emotional Effects*, *supra* note 49; John Pope, *Katrina Kids Can Recover; Mental Health Pros Offer Post-Storm Aid*, TIMES-PICAYUNE, Aug. 11, 2006, at 1.

[94] RAND News Release, *RAND Toolkit Identifies Programs for Long-Term Recovery Among Children Exposed to Significant Traumatic Events* (Oct. 24, 2006) ("'We found that following Hurricanes Katrina and Rita, schools were in a unique position to help the displaced students they enrolled, but had limited information about how to help,' said Lisa Jaycox, a RAND senior behavioral scientist. . . . [a]lthough schools have developed good capacity as 'early responders' to support communities in the aftermath of disasters or crises, they have much less experience in how to support the longer term mental health issues of students and staff members."). In the immediate aftermath of the hurricane, the National Association of School Psychologists emphasized the role schools could serve in helping students cope with Katrina. Hunter, *Schools Take in*, *supra* note 57; *see also* Edwards, *An Interdisciplinary Framework*, *supra* note 57, at 115, 120.

disorders and psychological reactions to disasters are common and have an enormous impact that extends to quality of life and economic recovery."[95]

In the two years after Katrina, several studies focused on survivors' mental health, and some on children.[96] These studies appear consistent with previous work evaluating connections between disasters and mental illness, which generally show that an increased level of mental illness often occurs among groups of people who have experienced disasters compared to those who have not, especially among vulnerable populations such as children; however, determining a specific level or rate of causation is incredibly challenging.[97] Anecdotal evidence buttresses these conclusions further.[98] Not all post-disaster

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[95] Kenneth B. Wells & Greer Sullivan, *Commentary*, NEWSDAY, Oct. 3, 2005.

[96] The Columbia University Mailman School of Public Health study focused on New Orleans evacuees and noted that "nearly half of the parents surveyed reported that at least one child in the household had emotional or behavioral difficulties that he or she didn't have before the hurricane, such as feeling sad or depressed, being nervous or afraid, or having problems sleeping or getting along with others." David Abramson & Richard Garfield, *On the Edge: Children and Families Displaced by Hurricanes Katrina and Rita Face a Looming Medical and Mental Health Crisis* (Apr. 2006). In March 2007, Dr. Irwin Redlener, a professor at Columbia University's Mailman School of Public Health which conducted the study released in 2006, commented that the mental health problems in Mississippi were more obvious than in Louisiana and characterized the health crisis in the region as "the most significant domestic crisis that we've seen in a very long time." Ryan Lafontaine & Joshua Norman, *Health Crisis: 'People Here Are Still Struggling'*, SUN HERALD, Mar. 16, 2007. Similarly, an August 2006 study by Harvard Medical School conducted one year after Katrina found that "cases of mental illness doubled after the disaster." Natalie Chambers, *Katrina's Aftermath*, HOUSTON CHRON., Oct. 27, 2006, at A6.

[97] Gadsen and Fuhrman, *supra* note 6, at 77-78 (discussing several such studies); *compare* Aptekar, *The Emotional Effects*, *supra* note 49, at 77.

[98] A doctor who provided medical services to students aboard a traveling Winnebago along the Mississippi coast noted nearly fifteen months after Katrina that she continued to be "overwhelmed by the number of children needing mental health services," and some of these students appeared to be exhibiting clear PTSD symptoms. Dreifus, *Attending to Sick Children*, *supra* note 16, at F2. A few months after Katrina, school nurses reported a higher level of vague physical complaints, headaches and stomach aches. Daly, *Helping Students*, *supra* note 49, at B3. And, Mississippi's school safety director Robert Laird conceded that the rate of student-initiated violence at all Mississippi Gulf Coast schools was higher during the 2006-2007 school year following Katrina than during the 2005-2006 year in which Katrina hit. Ryan LaFontaine, *Bay District Called Safe, One of State's Best, Expert Says*, SUN HERALD, Dec. 1, 2006, at A2; *see also* Ladner Interview, *supra* note 79.

student violence is attributable to PTSD or other anxiety disorders, but parents and schools should be able to recognize that a student's increased aggression, nightmares, difficulty sleeping or concentrating, self-imposed isolation from others, or physical illness may be a medical condition.[99] Because mental health problems are recognized disabilities under the Individuals with Disabilities in Education Act (IDEA), students can receive additional services if they have a diagnosed mental illness.

Many Mississippi school districts provided their students with counseling funded by federal and private grants and supplemented with local district dollars.[100] The Pascagoula School District worked with the nearby University of South Alabama; the Mobile, Alabama, Mental Health Center; and the Mobile County Public Schools to train its school counselors and design its own counseling program.[101] The Bay St. Louis-Waveland School District used federal restart money to provide counseling for its employees and students.[102] In some districts, certain positions were dedicated to the sole purpose of Katrina counseling.[103] At the state level, the Mississippi Department of Education offered "response teams of qualified school counselors" and also notified school districts that they could submit applications for grants from Mississippi's $1.7 million

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[99] Eboni M. Zamani-Gallagher & Vernon C. Polite, *Still Waters Run Deep: Cracks in the Educational Pipeline for African American Students Post-Hurricane Katrina*, *in* ROBINSON & BROWN 48, *supra* note 6; Brian Friedman, *School Disruptions May Leave Students Stressed; Symptoms of Anxiety Disorder Can Vary With Child's Age*, TIMES-PICAYUNE, Sept. 29, 2005.

[100] Ladner Interview, *supra* note 79; Rodolfich Interview, *supra* note 36; Interview with Herb Brown, Pascagoula High Sch. Guidance Counselor, in Pascagoula, Miss. (Oct. 20, 2006); *see also* PASCAGOULA SCHOOL DISTRICT, PROGRAM NARRATIVE: HURRICANE KATRINA COUNSELING INITIATIVE (undated) (on file with author). The U.S.-based International Medical Corps trained over one hundred Mississippi educators in assisting children in dealing with Katrina. Daly, *Helping Students*, *supra* note 50.

[101] PASCAGOULA SCHOOL DISTRICT, DISASTER COUNSELING AND STRESS MANAGEMENT TRAINING ACTIVITIES, SEPTEMBER 2005-MARCH 2006 (undated) (on file with author); CD: *Transcending Trauma After a Disaster: A Guide for Schools* (Univ. of S. Ala. College of Educ. undated) (on file with author).

[102] Davis, *Gulf Coast Districts*, *supra* note 66, at 28.

[103] *News Hour*, Apr. 6, 2006, *supra* note 1; Brown Interview, *supra* note 100.

Project School Emergency Response to Violence funds.[104] Furthermore, in October 2006 the Red Cross announced that the remainder of the $2.4 billion in Katrina donations it had received would be used to provide mental health services.[105]

Adequate funding for mental health services is necessary but not sufficient to address students' needs after a disaster. Although raising Americans' general level of awareness about mental health issues is a challenge beyond the scope of disaster planning, it is possible for local, state, and federal government officials, and especially school district administrators, to learn more about the ramifications of disasters for their students' mental health.[106] Understanding more about the reality of Katrina survivors' experiences can help accomplish that purpose; Barbara Barbieri McGrath edited a book collecting young Katrina survivors' reflections on their own experiences as expressed through artistic and written work.[107] Resources for educators and officials involved in disaster planning are available from many sources, including the RAND Corporation and The National Child Traumatic Stress Network.[108]

Fortunately, thousands of teachers have provided their students with tools for coping with Katrina; students making collages about their Katrina-related experiences in a Houston art class is just one example.[109] But teachers also have indicated concern about their students' long-term mental health.[110] As we look to the future, it is some of these teachers and their successors who can be provided with resources that will help avert a children's mental health crisis in the wake of another Katrina-like disaster.

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[104] Miss. Dep't of Educ., Katrina Recovery Information, *Frequently Asked Questions* (Nov. 4, 2005), *available at*: http://www.mde.k12.ms.us/Katrina/faq/index.html.

[105] Chambers, *Katrina's Aftermath*, *supra* note 97, at A6.

[106] *See generally* Wells and Sullivan, *Commentary*, *supra* note 95.

[107] BARBARA BARBIERI MCGRATH, THE STORM (2006).

[108] RAND, *Rand Toolkit*, *supra* note 94; National Child Traumatic Stress Network, *available at* http://nctsnet.org.

[109] *News Hour*, Apr. 6, 2006, *supra* note 1.

[110] *Id.*

III. CONCLUSION

Over fifty years ago, the Supreme Court stated memorably in *Brown v. Board of Education* that "education is perhaps the most important function of state and local governments."[111] In the immediate aftermath and short-term recovery period following Hurricane Katrina, the Mississippi Gulf Coast public school districts served a civic function much greater than the narrow instructional role we most often attribute to schools, performing vital tasks in their communities and thus helping to lay the groundwork for long-term recovery. The U.S. Department of Education reported that nearly two years after Katrina, ninety-nine percent of the schools in Mississippi that were harmed by Katrina were functioning again, as were ninety-five percent of their counterparts in Louisiana including about fifty percent in New Orleans—although some of these schools were operating out of trailers in long-term temporary quarters as they awaited the reconstruction of permanent buildings.[112] That is no small accomplishment.

Whether the Mississippi Gulf Coast will emerge from Katrina with the sort of "renaissance" as communities in Florida and South Carolina have been able to create after hurricanes devastated their communities is unclear. But, the Mississippi Gulf Coast has a better chance at a brighter future because of the role its public schools played in the immediate and short-term recovery effort.[113] Now, as the region moves forward, it must not forget that its students will always have Katrina as part of their childhood. And though it is far from perfect, we must not forget the model the Mississippi Gulf Coast schools have provided as anchors for rebuilding their communities.

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[111] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). For a discussion of the public function of education as one of creating citizens, see Betsy Levin, *Educating Children for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Susanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995); Peter D. Hart Research Assocs. & The Winston Group, *Ready for the Real World? Americans Speak of High School Reform* 20 (2005).

[112] U.S. Dep't of Educ., *Helping Gulf Coast Students*, *supra* note 19.

[113] *See generally* S. EDUC. FOUND., EDUCATION AFTER KATRINA, *supra* note 6; STENNIS INST., SPECIAL REPORT, *supra* note 6.

HURRICANE KATRINA AND THE REVISED BANKRUPTCY CODE: KICK 'EM WHILE THEY'RE DOWN

*John M. Czarnetzky**

I. INTRODUCTION

When Hurricane Katrina devastated the Mississippi Gulf Coast in August 2005, its timing raised, of all things, the propriety of the looming revisions to the United States Bankruptcy Code (the Code).[1] For years, Congress had struggled to revise the Code in response to criticism that it was too lenient to debtors, at least the perceived class of debtors who have the ability to pay at least a portion of their debts over time.[2] On the day that Katrina hit, the provisions of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (BAPCPA), the bill revising the Code, were approximately two months from full implementation on October 17, 2005.[3]

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[1] 11 U.S.C. §§ 101-1527 (2006).

[2] Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.). See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005), for an excellent summary of the legislative history of BAPCPA. *See also* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223 (2007) (discussing and criticizing BAPCPA).

[3] § 1501; 119 Stat. at 216.

Interestingly, in the aftermath of Katrina, one of the first impulses of many members of Congress was to move swiftly to lessen the impact of the new bankruptcy law on victims in the stricken areas by postponing or mitigating the effects of BAPCPA.[4] These efforts came to naught, but they raise the question that is central to this article: Is BAPCPA consistent with the underlying principles of the Bankruptcy Code?

This article's title perhaps tips the alert reader to its conclusion. The purpose of this article is to defend the proposition that a disaster of Katrina's magnitude starkly exposes the flaws in BAPCPA that, over time, will hurt the very individuals that the Code, properly understood, is designed to relieve from debt. As the Supreme Court has affirmed repeatedly, the Code is designed to relieve the "honest but unfortunate" debtor from debt in exchange for an orderly distribution of the debtor's assets to their creditors:

> [The] purpose of the [Bankruptcy] act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.[5]

Despite academic skepticism as to whether any underlying

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[4] *See* Financial Safeguards for Hurricane Survivors Act of 2005, H.R. 3662, 109th Cong. (2005) (proposing to delay effective date of BAPCPA by two years); *see also* S. Amend. 1678, 109th Cong. (2005) (deleted from final bill) (extending effective date of BAPCPA by one year); Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005) (making substantive changes to BAPCPA, such as exempting victims of natural disasters from having to endure credit counseling and debtor expenses incurred as a result of being victims of a natural disaster, to be used in "means test"); Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. (2005) (providing natural disasters be considered when debtor files for bankruptcy).

[5] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). See *Marrama v. Citizens Bank*, 127 S. Ct. 1105, 1107 (2007), for the most recent of numerous instances of the Supreme Court affirming this central purpose of the Code. The Court in *Marrama* stated: "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Id.*

"philosophy" animates the Code,[6] the Supreme Court's invocation of the concept of the "honest but unfortunate" debtor provides all the clues one needs to discern the reason the bankruptcy discharge exists. As I have argued elsewhere,[7] the Code is one of several legal/cultural requirements necessary to foster entrepreneurship in society. The bankruptcy discharge arose in England to relieve honest merchants who, through no fault of their own, had become bankrupt; the archetypal case was the importer whose ship sunk in a storm, losing its cargo and bankrupting the merchant.[8] The key point for our purposes is that the deal struck from the earliest history of the bankruptcy discharge is that an honest person, overwhelmed by debt through no fault of their own, could obtain relief from that debt from the state as long as they were willing to turn over all of their assets to their creditors. Relief from debt for such honest debtors gave them the freedom to begin anew, to accumulate capital, and to make their way in the world. In other words, a person who "plays by the rules," is honest, and is not profligate with other people's money, is entitled to another chance in life. By so liberating the "honest but unfortunate" individual from debt, the individual obviously benefits, but so does society, because the debtor's future efforts to pursue virtuously economic gain will benefit all.

Much history separates the seventeenth century English merchant from ordinary twenty-first century Mississippians, but the justification for debt relief is the same in either case. Having been born of merchants losing capital in faraway storms, the bankruptcy discharge equally should provide relief to modern persons who have the ability to accumulate capital which far exceeds that of merchants 400 years ago. The

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[6] *See, e.g.*, Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336 (1993) (examining the wide variety of goals within the bankruptcy system, and arguing that there is not "one" overarching philosophy of the Code).

[7] John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393 (2000).

[8] *See id.* at 446. Indeed, Shakespeare's *The Merchant of Venice* centers on just such a scenario, though it illustrated the perils of debt collection—for both debtor and creditor—in a world without the bankruptcy discharge. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE (Washington Square Press 2004) (1596).

Mississippians on the Gulf Coast in August 2005, were as "honest but unfortunate" a group as those English merchants.

Sadly, at the precise moment that the bankruptcy discharge was crucial to thousands of "honest but unfortunate" Mississippi debtors, the provisions of BAPCPA were set to undermine the ancient goals of the Code. Although BAPCPA imposed a number of bureaucratic requirements of dubious merit[9]—mandatory financial counseling, additional paperwork, etc.—its centerpiece was its narrowing of access to Chapter 7 of the Code for individuals who theoretically could repay their creditors out of future income.[10] The mechanism for this is the "means test" of section 707 of the Code which, in tortuous and prolix prose, forces most individuals with above median income for their area into filing a Chapter 13 individual reorganization rather than liquidating their assets immediately under Chapter 7 and receiving an immediate discharge of their debts.[11]

Thus, the old notion of the "honest but unfortunate" debtor meriting a discharge of their debts so that they immediately may start afresh is exchanged under BAPCPA for a minimum five-year period of wage servitude to creditors.[12] Providentially or not, the timing of Katrina provides a melancholy test of BAPCPA's underlying assumptions about bankruptcy debtors and the bankruptcy discharge in the context of a collective natural disaster. It is the thesis of this article that BAPCPA is inconsistent with the traditional philosophy of the bankruptcy discharge and, therefore, is likely to cause more mischief in future disasters (both collective *and* individual) than any benefits it might bestow upon creditors.

In testing this thesis, I will sketch in Part II of this article the legislative response to Katrina in the bankruptcy context, followed in Part III by what I will term the "bureaucratic"

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[9] That is, of dubious merit at least to the "honest but unfortunate" debtor. It is inevitable that, in an entrepreneurial society and in the face of ineradicable uncertainty about the future, individuals will take honest, reasonable risks with their capital and, sometimes, fail. *See* Czarnetzky, *supra* note 7, at 398.

[10] 11 U.S.C. § 707 (2006).

[11] *Id.* § 707(b).

[12] *Id.* § 707.

response of the United States Trustee's program, an administrative arm of the bankruptcy court administered by the United States Department of Justice, to Katrina.[13] In Part IV, I will discuss studies concerning the relationship between bankruptcy and natural disasters, and how the response to Katrina exposes the central flaw of BAPCPA's means test. I will conclude with some brief remarks tying the preceding discussion back to the "honest but unfortunate" debtor.

II. CONGRESSIONAL RESPONSE TO KATRINA: THE BANKRUPTCY CONTEXT

In the wake of Katrina, it did not take long for members of Congress to attempt to ameliorate the anti-debtor provisions of BAPCPA.[14] Within weeks of the hurricane, several bills were introduced in both houses of Congress, none of which progressed out of committee.[15] The lack of progress on these bills demonstrates that Congress is focused on the repayment of creditors at the expense of the debtor's fresh start. The proponents of BAPCPA clearly have prevailed in Congress.

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[13] See *infra* Part III for a very brief discussion of the United States Trustee program and its genesis.

[14] At the outset, it should be noted that two other works also address the "bankruptcy" response to Hurricane Katrina. *See* Robert M. Lawless, *Bankruptcy Filing Rates After a Major Hurricane*, 6 NEV. L.J. 7 (2005); Michael Anthony Sabella, Note, *The Category 5 Crisis: How Hurricanes Katrina and Rita Exposed Deficiencies in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 15 AM. BANKR. INST. L. REV. 321 (2007). Although I differ with these authors regarding what is necessary to "fix" the Code after BAPCPA as illustrated by Katrina victims—I would repeal BAPCPA; whereas, the other authors, to one extent or another, would amend the Code instead—both articles are excellent resources on the interplay between Hurricane Katrina and BAPCPA.

[15] The Financial Safeguards for Hurricane Survivors Act of 2005 was introduced on September 6, 2005. H.R. 3662, 109th Cong. (2005). Two additional bills were introduced on September 8, 2005: The Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005); and The Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. (2005). *See generally* Cong. Research Serv., *Proposed Bankruptcy Legislation to Address Natural Disaster Victims*, Code RS 22275 (Sept. 22, 2005) [hereinafter *Proposed Bankruptcy Legislation*].

A. House Bill 3662 and Senate Amendment 1678

House Bill 3662, the Financial Safeguards for Hurricane Survivors Act, was very succinct; it would have amended BAPCPA to delay the implementation of the Code revisions for an additional two years until October 2007.[16] The bill was referred to a subcommittee of the House Judiciary Committee, never to see the light of day.[17] Shortly thereafter, Senate Amendment 1678 was introduced to an unrelated House appropriations bill to extend, by one year, the implementation of BAPCPA; however, this amendment was deleted from the final bill.[18]

Simply delaying the implementation of BAPCPA likely would have been of only limited utility to Katrina victims. As will be discussed *infra*, empirical data indicates that it takes two to three years for the financial disruptions caused by a natural disaster to work their way through the bankruptcy courts in the form of bankruptcy filings.[19] If that holds true in the case of Katrina—and it may be difficult to confirm due to the seemingly permanent diaspora of many of its victims—it is only now that such victims should be filing bankruptcy cases in large numbers.[20] Thus, Katrina victims who filed bankruptcy cases after October 2007, would not have been aided at all by either piece of legislation.

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[16] H.R. 3662, 109th Cong. § 2 (2005). The bill would have changed the time period before implementation of BAPCPA from 365 days—i.e., October 17, 2005—to 910 days, thus delaying full implementation of BAPCPA for an additional two years. *Id.*

[17] Summaries of these and other congressional bills discussed, as well as their status, are found on the government's "Thomas" website, www.thomas.loc.gov, last visited January 26, 2008.

[18] *See generally Proposed Bankruptcy Legislation*, *supra* note 15.

[19] *See infra* Part IV.A; *see also* Sabella, *supra* note 14, at 339.

[20] Elizabeth Warren, *Natural Disasters and Bankruptcy: A Perspective*, COMMUNITIES & BANKING 3 (2005) (using the term "diaspora" for Katrina victims and noting that victims of natural disasters will live on credit in the aftermath of a natural disaster, ultimately delaying bankruptcy filings for a few years). The latest information from the Administrative Office of Federal Courts indicates that bankruptcy filings in the bankruptcy courts for both the Southern and Northern Districts of Mississippi are much lower than before Katrina and the implementation of BAPCPA. *See infra* notes 41-42 and accompanying text (discussing bankruptcy filing statistics from the Northern and Southern Districts of Mississippi since Hurricane Katrina).

B. House Bill 3697 and Senate Resolution 1647

Two bills subsequently were introduced which substantially would have amended the Code to patch some of the gaps in BAPCPA revealed by Katrina. House Bill 3697 would have added a statutory definition of "victim of natural disaster" and provided several protections to such individuals.[21] Crucially, such debtors' Chapter 7 filings could not be dismissed for failing BAPCPA's means test, nor would the calculation of their current monthly income include payments on account of their status as victims of a natural disaster.[22] The effect of these provisions would be that victims of natural disasters—which could have included any natural disaster, not just hurricanes[23]—*could have* filed Chapter 7 liquidation to obtain immediate relief from their debts whether or not they would have otherwise qualified for Chapter 7 relief under the means test. The bill also would have extended certain time periods in the Code, including those for filing documentation in support of a bankruptcy petition.[24] House Bill 3697 was referred to a subcommittee of the House Judiciary Committee on October 17, 2005, where it languished and died.

Senate Bill 1647 proposed similar substantive changes to the Code. Most importantly, the bill would have excused victims of natural disasters, a defined term,[25] from the BAPCPA means test for "bankruptcy abuse." Moreover, it provided that the court could not dismiss or convert an individual Chapter 7 case.[26] As with House Bill 3697, the bill would have authorized the bankruptcy court to extend statutory deadlines governing the filing of financial documents in connection with the case.[27] The bill was referred to the Senate Judiciary Committee on

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[21] Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. § 2(c) (2005).

[22] *Id.* § 5.

[23] *Id.* § 2.

[24] *Id.* § 4.

[25] Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. § 3 (2005).

[26] *Id.* § 6.

[27] *Id.* § 5.

September 8, 2005, and never emerged.

These two bills would have partially repealed the central feature of BAPCPA—the means test and its bar to filing Chapter 7 for above median income debtors—at least for victims of natural disasters. It is not surprising, therefore, that the bills were defeated by the supporters of BAPCPA. As Senator Charles E. Grassley (R-Iowa), a major architect of BAPCPA, commented, no major changes to BAPCPA were necessary as "[t]he new bankruptcy law already allows bankruptcy courts significant flexibility to look at the special circumstances surrounding an individual's financial situation."[28] Although congressional efforts to mitigate the impact of BAPCPA stalled, the Executive Office of the United States Trustee and its regional office covering Louisiana and Mississippi stepped in to provide a modicum of relief for Katrina victims.

III. THE UNITED STATES TRUSTEE'S RESPONSE

The United States Trustee (the UST) is an organ of the Department of Justice which was created as part of the promulgation of the Code in 1978. Before 1978, bankruptcy judges were called "referees," and they had significant administrative as well as judicial functions. In overhauling United States bankruptcy law, Congress decided to separate the administrative and judicial functions of the bankruptcy referees and lodge each responsibility with a different party. Judicial functions remained with bankruptcy referees, who were renamed judges. Administrative duties of referees were transferred to the newly created UST.

A. The EOUST Response to Katrina

In response to Hurricane Katrina, the Executive Office of the UST (the EOUST), in a series of press releases, informed the bankruptcy bar and the public of several policy positions that the relevant UST's offices[29] would take in response to Katrina.[30]

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[28] *Legislative Highlight: Congress Considers Katrina Impact*, AM. BANKR. INST. J., Oct. 2005, at 3 (quoting Senator Grassley).

[29] The relevant UST office for Mississippi is Region 5 headed by Michael Bolen. Mr.

The October 5 Release provided a number of substantive positions that the EOUST would take in response to Hurricane Katrina, which are worth reproducing at length:

> The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which takes effect on October 17, 2005, contains various new requirements for parties to a bankruptcy proceeding. The [EOUST] announced it is taking the following steps to address the impact of current law and the BAPCPA upon victims of natural disaster.
>
> • **Document Requirements**—Under current law and the BAPCPA, debtors provide documents such as payment advices and statements of income. U.S. Trustees will not file enforcement motions against debtors who cannot produce documents due to natural disasters, if they are otherwise eligible for bankruptcy relief.
>
> • **Means Test**—Under the BAPCPA, individual debtors

Bolen was singled out and commended by the EOUST for his role in coordinating bankruptcy court operations and helping to get the system up and running very quickly. Press Release, U.S. Tr. Program, R. Michael Bolen is Reappointed as United States Trustee for Louisiana, Mississippi (Aug. 3, 2007), http://www.usdoj.gov/ust/r05/pdfs/bolen_reappointment_080307.pdf.

[30] Press Release, U.S. Dep't of Justice, Executive Office for U.S. Treas., U.S. Trustee Program Announces Approval of Credit Counseling Agencies for Bankruptcy Filers and Waiver of Credit Counseling Requirement in Areas Affected by Hurricane Katrina (Oct. 4, 2005) [hereinafter October 4 Release] (on file with author), *available at* http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051004.pdf; Press Release, U.S. Dep't of Justice, Executive Office for U.S. Trs., U.S. Trustee Program Announces Enforcement Guidelines for Bankruptcy Debtors Affected by Natural Disasters (Oct. 5, 2005) [hereinafter October 5 Release] (on file with author), *available at* http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051005.pdf (providing several substantive positions of the UST in response to Katrina); Press Release, U.S. Dep't of Justice, Executive Office for U.S. Treas., U.S. Trustee Program Extends Waiver of Credit Counseling and Debtor Education Requirements in Areas Affected by Hurricane Katrina (Sept. 21, 2006) [hereinafter September 2006 Release] (on file with author), *available at* http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20061005.pdf (extending the provisions of the October 5 Release for another year). *See also* Clifford J. White III, Dir., Executive Office for U.S. Treas., Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act (Dec. 6, 2006), at 8, http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/testimony061206.pdf (EOUST's flexible actions in response to Katrina constitute "[an] important, positive sign . . . that there is adequate capacity to serve the debtor population . . . .").

undergo a "means test" to determine whether they are eligible for Chapter 7 relief or whether Chapter 7 relief is presumed abusive. Generally speaking, the BAPCPA permits a debtor to rebut that presumption of abuse by showing "special circumstances." In determining whether to file an enforcement motion on grounds of presumed abuse, the [UST] will consider income loss, expense increase, and other adverse effects of a natural disaster to constitute "special circumstances."

• **Attendance at Creditors' Meetings**—U.S. Trustees will exercise flexibility and provide alternative means for a debtor to attend the mandatory meeting of creditors if, due to the adverse effects of a natural disaster, the debtor cannot appear personally and testify under oath in the district where the case is filed.

• **Venue**—U.S. Trustees will not raise or support venue objections in cases in which the debtor was displaced due to a natural disaster, unless the filing constitutes a systemic abuse or presents extraordinary circumstances.

• **Small Business Chapter 11 Bankruptcies**—U.S. Trustees will not take enforcement actions against Chapter 11 small business debtors who, as a result of a natural disaster, cannot reasonably be expected to perform statutory duties such as attending an initial debtor interview and filing financial reports. U.S. Trustees will not seek conversion or dismissal of a small business Chapter 11 case if the grounds for filing the case are attributable to a natural disaster and there are reasonable prospects for reorganization. U.S. Trustees will not oppose reasonable and necessary extensions of time to file a disclosure statement and confirm a reorganization plan, if a small business debtor cannot comply with the deadlines because of a natural disaster.

The BAPCPA requires individual debtors to undergo credit counseling before filing for bankruptcy. The BAPCPA authorizes U.S. Trustees to approve credit counseling agencies according to criteria set forth in the law. On October 4, 2005, the Program announced a temporary waiver of the statutory requirements for credit counseling for bankruptcy filers in

> Louisiana and the Southern District of Mississippi due to the effects of Hurricane Katrina.[31]

The October 5 Release is self-explanatory, but its import is curious. Comparing the EOUST's view of the impact of BAPCPA (as reflected in the October 5 Release), it is evident that the EOUST agrees with the Congress members who sought to mitigate legislatively BAPCPA's impact on Katrina victims. In its announcement, the EOUST endorses the view that the means test—the centerpiece of BAPCPA—and the bureaucratic requirements of the new law such as paperwork and credit counseling were too burdensome to insist that Katrina victims meet their requirements. To be fair, credit counseling likely was not readily available in devastated areas, and Katrina victims might have had difficulties in producing documents that had been destroyed by floods and wind.[32] Nevertheless, a closer look at the EOUST's response to Katrina reveals at best some ambivalence about BAPCPA's revisions of the Code as applied in a natural disaster. To better illustrate this point, a closer look at the interplay of BAPCPA and natural disaster victims is in order.

IV. BAPCPA'S POTENTIAL IMPACT ON KATRINA VICTIMS

The legislative and bureaucratic responses to Katrina indicate that there was a genuine concern that BAPCPA would harm Katrina victims in certain respects. Much of the response was a practical concern with bankruptcy court procedures such as document filings. However, the response to Katrina also shows a concern with the means test, the BAPCPA provision that most clearly illustrates current congressional philosophy of the Code. In this section, I will focus on the interplay between BAPCPA and a natural disaster such as Katrina in an effort to understand the basis for the concerns, whether the responses were adequate to the problem and, on a more general level, whether or not BAPCPA is a retreat from the purpose of the Code. First, however, it will be helpful to briefly discuss the

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[31] October 5 Release, *supra* note 30.

[32] *See infra* notes 55-57 and accompanying text.

current understanding of how a large natural disaster such as a hurricane affects the bankruptcy system.

A. Empirical Evidence Regarding Bankruptcy Filings and Natural Disasters

A recent study considered the impact of natural disasters on bankruptcy court filings.[33] Professor Robert Lawless examined the rate of bankruptcy filings in affected jurisdictions for several years after each of the eighteen hurricanes that made United States landfall between 1980 and 2004.[34] Lawless concluded that:

> [t]aken together, the available data indicate that areas affected by a major hurricane experience a marked increase in bankruptcy filing rates twelve to thirty-six months after the hurricane. Given that the data are basic state and judicial-district level filing rates and that the number of observations is few, it is remarkable that such a distinct pattern emerges.[35]

Of special note is the data for the one storm—Hurricane Elena in 1985—that came ashore in Mississippi.[36] Indeed, as Lawless demonstrates, Hurricane Elena is perhaps the most extreme case in support of his thesis.[37] Within one year of Elena's landfall, bankruptcy filings in the area increased by 22.1% over previous time periods; within two years, the increase was 51.4%; within 36 months, however, the increase in bankruptcy filings was a startling 71.8%.[38] Moreover, because

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[33] Lawless, *supra* note 14 (analyzing data from the eighteen hurricanes that made landfall in the United States from 1978—the year the Code was promulgated—through 2004, on the eve of Katrina). Another, less satisfactory study covered similar ground. *See* Edward Flynn, *Bankruptcy and Natural Disasters*, AM. BANKR. INST. J., Dec.-Jan. 2005, at 20, 76 (studying effects of Hurricanes Hugo, Andrew, and Floyd on flooding in the Midwest and Plains states and the San Francisco earthquake). However, the Flynn study has been criticized—convincingly to the author's mind—as inadequate and faulty. *See* Lawless, *supra* note 14, at 9-10; Sabella, *supra* note 14, at 326-27. In the interest of space, I will only consider the more complete study by Professor Lawless.

[34] Lawless, *supra* note 14.

[35] *Id.* at 14-15.

[36] *Id.* at 11 tbl.1.

[37] *Id.* at 13 tbl.2.

[38] *Id.*

the relative value of individual property losses that resulted from Elena—as measured by claims made to FEMA for flood insurance—was lower than average for other storms, Lawless drew the conclusion that "[r]elatively poorer areas experience a greater increase in bankruptcy filings than do wealthier areas."[39] Although Professor Lawless was careful to call for additional empirical testing of his hypothesis, it does make intuitive sense that individuals who suffer losses in a hurricane might require some period of time to take stock, begin to rebuild their lives, and, after a suitable interlude, turn to their financial affairs.

Whether Professor Lawless's conclusions will hold true in the case of Katrina will be extremely difficult to measure. The Administrative Office of the United States Courts maintains a website which provides the latest information on the number of bankruptcy filings, broken down by district and by state.[40] Looking at the statistics for bankruptcy filings in the Southern District of Mississippi for the past several years, filings have *declined*, including a precipitous decline of 63.6% in filings for the time period between December 31, 2005, and 2006.[41] The latest available figures are for the first quarter of 2007, and the trend of greatly reduced bankruptcy filings in the Southern District of Mississippi appears to continue; there were 1,499 total filings in the Southern District in the first quarter of 2007.[42] Thus, through March 2007, a bit over a year and a half after Katrina, the number of bankruptcy filings in the Southern District of Mississippi has declined significantly. Does this refute Lawless's hypothesis?

There are three reasons for answering in the negative.

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[39] *Id.* at 14-15.

[40] *See* U.S. Courts, Bankruptcy Statistics http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm (last visited Jan. 27, 2008). All statistics cited in the text were retrieved from the various tables found on this website.

[41] The raw numbers were 13,784 filings for calendar year 2005 compared with 5,012 for 2006. The decline in bankruptcy filings for the Northern District of Mississippi was almost exactly equal to that for the Southern District for that time period—a decline of 61.5%. *Id.*

[42] Similarly, the Northern District of Mississippi had 1,135 total filings, consistent with the 2006 filings in that court. *Id.*

First, Lawless noted that bankruptcy filings do not increase in the wake of a hurricane until two to three years after the storm, and thus it is still a bit early to view the data from southern Mississippi as refuting his thesis. Moreover, it is important to note that Katrina was not just a "normal" hurricane (with all the devastation that "normally" comes with a hurricane), but rather the largest natural disaster in the history of the United States. As more than one commentator has noted, a disaster of Katrina's magnitude did not just displace people from their homes, but rather created a diaspora of internal migrants.[43] Thus, in order to test Professor Lawless's theory in the case of a disaster the size of Katrina, a sophisticated empirical study which accounts for the destination districts of displaced Katrina victims would have to be undertaken. Finally, because many debtors filed bankruptcy petitions in the fourth quarter of 2005 in order to escape BAPCPA, it is difficult to determine how much of the decline in filings would have occurred in any event without Katrina. A quick glance at statistics from around the country confirms that bankruptcy filings uniformly declined from the fourth quarter of 2005, when BAPCPA was to take effect, through today. Interestingly, the Southern District of Mississippi experienced a significant increase in fourth quarter 2005 over the previous couple of years—3,912 filings for 2005 versus 2,907 for 2004 and 3,119 for 2003. How much of that difference is due to Katrina and/or the anticipation of BAPCPA is difficult to assess from this remove, but it is a good working hypothesis that the steep decline in bankruptcy filings in Mississippi bankruptcy courts since 2005 is due to the displacement of citizens caused by Katrina combined with the delay effect identified by Professor Lawless from other hurricanes.

The steep decline in bankruptcy filings may betoken another fact of life after Katrina and confirmed by Lawless in lesser hurricanes—it takes time for economic activity, including creditor enforcement activity, to return to normal. Indeed, in the wake of Katrina's devastation, it is quite likely that creditors

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[43] Warren, *supra* note 20, at 5.

as well as debtors have not yet returned to normal operations though, of course, this conjecture is difficult to prove other than by anecdote.[44] This casts significant doubt on the legislative efforts to delay for a year or two the implementation of BAPCPA for victims of Katrina or other natural disasters. The data indicate that it takes a longer time period for the economic effects of even a "normal" hurricane to manifest itself financially. In a storm such as Katrina, the devastation is so complete that the time period might be even longer, and is certainly more difficult to measure.

B. The BAPCPA Means Test and Hurricane Katrina Victims

The legislative and EOUST responses to Katrina were strikingly uniform, including the idea that BAPCPA's central innovation—the "means test" which sets a threshold for who may file a Chapter 7 liquidation or who must file a Chapter 13 reorganization case—should be suspended for Katrina victims. A brief explanation is in order.[45] A debtor in a Chapter 7 liquidation case exchanges all of her non-exempt assets—which will be distributed in an orderly process to her creditors—for a permanent, federal discharge of her pre-bankruptcy debts. In Chapter 13, an individual debtor "reorganizes" her affairs through a streamlined version of corporate reorganization law. In exchange for keeping all of her assets, the debtor must

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[44] Several informal and "off the record" discussions between the author and bankruptcy professionals seem to bear out the fact that the devastation wreaked by Katrina was so complete that the creditor community—secured and unsecured—has not yet worked out what their ultimate position will be concerning enforcement of their creditors' rights against Katrina victims.

[45] For more extensive critical discussions of BAPCPA, its provisions, and the philosophy of bankruptcy reform see, for example, Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457 n.3 (2005); Carlson, *supra* note 2; Czarnetzky, *supra* note 7; Robert J. Landry, III & Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91 (2006); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191 (2005); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 284 (2005).

provide a plan of reorganization which, over a period of some years, will provide a stream of payments to her creditors equal at least to what those creditors would receive in a liquidation case on the date of filing.[46] The debtor must also devote all of her disposable income—income remaining after reasonable living expenses—to her plan payments even if this means that her creditors would receive *more* than they would have received had the debtor chosen to liquidate on that date. It is this latter possibility that makes Chapter 13 attractive to creditors and legislators alike—Chapter 13 theoretically provides a greater return to creditors than Chapter 7 liquidations.[47]

The preference for Chapter 13 and the idea that a number of debtors with the ability to repay are escaping their obligations through Chapter 7 liquidations is the primary impetus behind BAPCPA and its "means test," which seeks "to measure the ability of Chapter 7 debtors to repay debt and then, if they have sufficient debt-paying ability, to make them repay at least some of their debt—likely through Chapter 13—in order to receive a bankruptcy discharge."[48] Space considerations preclude a full discussion of the means test and how it works,[49] but its general outline is relatively easy to explain. Although individuals and most forms of business organizations are eligible to file a

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[46] This is the "best interest of creditors" test. 11 U.S.C. § 1325(a)(4) (2006).

[47] Whether that is true empirically is a topic of hot dispute in bankruptcy literature. *See* Czarnetzky, *supra* note 7 (summarizing the empirical and scholarly debate over returns in Chapter 13).

[48] Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005).

[49] For excellent discussions of this sort see, for example, Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1 (1998); Carlson, *supra* note 2; Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665 (2005); Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27 (1999); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177 (1999); Gary Klein, *Means Tested Bankruptcy: What Would It Mean?*, 28 U. MEM. L. REV. 711 (1998); Eric A. Posner, *Should Debtors Be Forced into Chapter 13?*, 32 LOY. L.A. L. REV. 965 (1999); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1 (2001).

Chapter 7 liquidation,[50] that broad eligibility is tempered by the Code's definition of "substantial abuse" of the bankruptcy system, a ground for dismissal of a Chapter 7 case.[51] As amended by BAPCPA, whether a consumer debtor's Chapter 7 petition is abusive depends upon whether the debtor's household income is more or less than the statutorily-defined median income for the debtor's home state.[52] If it is not, the debtor may file Chapter 7; if their income is greater than the median, the debtor must then make a complicated calculation of their living expenses—which includes some statutorily-presumed as well as actual expenses of the debtor—in order to determine whether the debtor has excess income theoretically available to pay creditors in a Chapter 13 plan. If such excess income is available, then the debtor's Chapter 7 case must be dismissed as an abuse of Chapter 7, or converted to a Chapter 13 case instead.

Why, despite complications with applying the tests involved, is any of this a bad thing? Why would some members of Congress and, apparently, the EOUST, find BAPCPA's means test burdensome enough to Katrina victims that it ought to be suspended by legislation or not enforced, at least by the UST?

Two explanations come to mind. First, the very practical concern that application of the means test is so complicated that it was best to postpone its application rather than force victims of a natural disaster and, more importantly, their lawyers, to climb the learning curve required by the means test at the same time they were dealing with devastation around them. Second, perhaps there was a fear that Chapter 13 itself would work an injustice in some cases.

As amended by BAPCPA, an above median income debtor's Chapter 13 plan must last five years.[53] That means that a Katrina victim who is denied the ability to file a liquidation bankruptcy through the means test—after untold losses, both financial and personal—will now have to turn over any excess

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[50] 11 U.S.C. § 109(b) (2006).

[51] *Id.* § 707(b).

[52] *Id.* § 707(b)(2).

[53] *Id.* § 1325(b)(4)(A)(ii).

income they earn over five years to their creditors. The honest but unfortunate Katrina victim will not be able to make a fresh start in life for that period of time. The delayed fresh start will be due entirely to the fact that the Katrina victim, despite losing their material possessions and having to rebuild their financial life, presumably through credit, has found or has retained their job and continued working.

In short, perhaps the concern underlying efforts to suspend BAPCPA's means test for Katrina's victims is that Chapter 13 is too harsh a model into which all disaster victims should be forced. It is not readily apparent, however, what (other than magnitude) separates the "honest but unfortunate" debtors who are victims of a disaster such as Katrina from individuals who are "honest but unfortunate" victims of more quotidian disasters—fires, job loss, medical bills, care of loved ones, economic losses from entrepreneurship, etc.[54] If being wiped out by Hurricane Katrina is cause to permit debtors to liquidate immediately and get on with a fresh start in life, why are other more personal or localized, but no less disastrous, events that destroy one's finances not enough as well? If it is unseemly to pile on a Katrina victim—to "kick 'em while they're down"—why is the typical "honest but unfortunate" debtor not entitled to the same consideration after their personal disaster?

One final point about the EOUST's October 5 Release concerns its discussion of the means test. The October 5 Release went as far as the EOUST could go regarding the means test, but it ultimately is too little to guarantee the result it contemplates. The EOUST announced that its policy was to consider a Katrina victim's actual financial losses in deciding whether or not to file a motion for substantial abuse under section 707(b) of the Code. However, the creditors can also assert substantial abuse, and the UST has no authority to stop them, other than the UST's inherent authority to appear and oppose such a motion. Given the uncertainty surrounding the means test and its perceived rigidity of application, it is unclear

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[54] *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000) (most bankruptcy debtors are honest but unfortunate victims of job loss or medical bills in the United States).

how much flexibility courts have in circumventing the means test.

C. The "Bureaucratic" Aspects of BAPCPA and Katrina Victims

Katrina's devastation affected all aspects of normal life on the Mississippi Gulf Coast, and the operation of the bankruptcy courts is no exception. It was therefore predictable that the response to Katrina would include some practical concessions to the grim facts of post-Katrina life on the Coast. The EOUST, having administrative responsibilities in bankruptcy cases, took immediate, practical action through its October 5 Release, pledging to not seek enforcement actions under BAPCPA's increased document production requirements against debtors who were unable to produce the required documents in the wake of the storm.[55] There is some question about whether or not the EOUST's action will prevent the courts from dismissing bankruptcy cases if the documentation is not provided, either because they have no power to do so or because creditors object.[56] This concern would have disappeared if Congress had passed legislation which suspended these requirements;[57] as it

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[55] 11 U.S.C. §§ 521, 707 (2006). The October 5 Release also excused small business owners from BAPCPA's special filing and reporting requirements for small businesses as long as the failure to comply is due to a natural disaster and there are reasonable prospects for a reorganization. *See id.* § 1116 (containing most of the small business document production and other requirements). The latter requirement still would require a small business person to provide the UST with some type of evidence regarding its reorganization prospects, which in itself might be too burdensome a requirement in the immediate aftermath of a hurricane.

[56] *Id.* § 521(i)(1) (stating bankruptcy court must dismiss case on forty-sixth day if debtor fails to file necessary paperwork). *See also In re* Riddle, 344 B.R. 702, 703 (Bankr. S.D. Fla. 2006) (case must be dismissed on the 46th day if paperwork filing requirements are not met); *In re* Fawson, 338 B.R. 505, 510 (Bankr. D. Utah 2006) (same; no court discretion to extend period). On the question of whether bankruptcy courts have any discretion in whether or not to dismiss a case in such a situation, Chief Judge Edward Ellington of the United States Bankruptcy Court for the Southern District of Mississippi has been quoted as expressing doubt as to whether courts have any choice in the matter. *See* Warren, *supra* note 20, at 5 (quoting Judge Ellington regarding a judge's power to waive document production requirements of debtor: "I can't grant the waiver on the front end because I just don't have the authority to do it.").

[57] As described *supra*, there were attempts in Congress to do just that. *See supra*

was, the EOUST did all that it could to relieve debtors from these requirements, and to signal clearly to the creditor community its position on any potential dismissal motion brought by creditors based on them.

In addition to the documentation requirements, the EOUST waived BAPCPA's requirements for credit counseling within six months of filing their bankruptcy petition, and for attendance at a financial management course before a debtor could receive a discharge. Presumably, the displacement of victims from the Mississippi Coast made such requirements very difficult to meet in any event. In a similar vein, the EOUST pledged to be flexible in arranging required creditors' meetings. Although there was no exception to these type of filing and counseling requirements in BAPCPA for victims of natural disasters, the waivers of these requirements seems a reasonable—if perhaps not permitted by a punctilious reading of the Code—accommodation to the reality of post-Katrina life on the Coast. Finally, the EOUST promised not to raise objections to venue, presumably to allay concerns that BAPCPA's venue provisions might require dismissal of bankruptcy filings by displaced Katrina victims in their new home states.[58]

D. Unforeseen Effects of BAPCPA

Courts, attorneys and commentators have not had enough time to assess fully all unforeseen consequences of BAPCPA. The infelicitous intersection of Hurricane Katrina's landfall and BAPCPA's entry into force might highlight some of these consequences sooner rather than later. Moreover, perhaps, the potential injustices wrought by BAPCPA might be easier to assess in the context of Katrina's devastation than otherwise.

Consider the following hypothetical. An above median income wage-earner on the Mississippi Gulf Coast had

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notes 22-28 and accompanying text.

[58] 28 U.S.C. § 1408(1) (2006) (stating that bankruptcy venue is appropriate in the district where the debtor has lived for the 180 days before bankruptcy). As one commentator has noted, however, this action might not even have been necessary given the federal courts' power to transfer cases in the "interest of justice." *See* Sabella, *supra* note 14, at 345-46.

purchased a house on August 1, 2005, worth $200,000 with $40,000 down. Katrina destroyed the home before any payments could be made. The homeowner chooses to stay on the Gulf Coast in Katrina's wake and attempt to rebuild his home and his family's life. However, with the home destroyed and problems settling with the insurance company over his claim[59] for destruction of the home, he decides to file a bankruptcy case.

Our debtor wishes to file a Chapter 7 case in order to abandon the destroyed home to the secured creditor and receive a discharge of the deficiency claim. Despite the UST's failure to object to the debtor doing so,[60] the secured creditor objects that the debtor fails the means test of section 707(b), and thus the debtor's case must be dismissed for substantial abuse of Chapter 7 or converted to a Chapter 13.[61] This puts our Katrina victim to a harsh test. On the one hand, not receiving a bankruptcy discharge will leave the debtor open to a judgment for the $160,000 balance on the home loan after the debtor turns over the land to the lender, or the lender forecloses and seizes it.[62] The result would be the debtor will have a $160,000 deficiency judgment hanging over their head. If the debtor could file a Chapter 7, the result would be much the same. The debtor could abandon the property to the lender, sell the property, or simply keep it (because it is worth less than the exemption amount),

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[59] Let us assume that any proceeds from an insurance settlement, regardless of amount, will go to the secured creditor regardless of what route the debtor takes to settle their dispute. Let us further assume that, in this case, such insurance recovery will be minimal and/or take a number of years to resolve.

[60] As promised in the October 5 Release.

[61] Let us not be too hard on secured creditors who might pursue such a harsh course. Banks and other lenders are not eleemosynary institutions, *see* Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990), and thus their representatives arguably have a duty to maximize recovery from defaulting debtors provided, of course, that their actions in attempting to collect aggressively from Katrina victims would not cast them in such a negative light that future business would be decimated. Let us assume in our hypothetical that the lender has made the business calculation that collecting from such victims will not significantly harm the lender's future business.

[62] The debtor will exempt up to the previous $40,000 in equity in the home (assuming the land is worth something at all) under Mississippi exemption law. MISS. CODE ANN. § 85-3-21 (West 2007). Let us assume for the purposes of this hypothetical that the post-Katrina value of the land where the home stood is $40,000 or less.

and receive a discharge of the unsecured deficiency debt—$160,000 in our example.[63]

Under BAPCPA, however, the above median income debtor must file a Chapter 13 case. Home mortgages are not modifiable in Chapter 13,[64] and thus if the debtor keeps the property with the destroyed house, he would have to make mortgage payments pursuant to the contract between the parties, without modification. For our debtor, that would be a ridiculous result, so he would take advantage of another provision of Chapter 13 simply to surrender the property to the creditor,[65] leaving an unsecured claim for the remainder. So, once again, the debtor will be left owing a $160,000 unsecured claim to the lender. To this point, the result is the same between Chapter 7 and Chapter 13—the secured claim is satisfied by surrendering the property, leaving the creditor with an unsecured deficiency claim.

However, Chapter 13's entire justification, at least from Congress's point of view, is to ensure a greater recovery to unsecured creditors than in Chapter 7. The Code accomplishes this by requiring that a Chapter 13 debtor devote all of his "disposable income" during the plan's duration to paying their debts to unsecured creditors.[66] Thus, Chapter 13, which arguably is our Katrina victim's only option under the Code, would require the Katrina victim to devote all of their excess income over the next five years to paying off part of the deficiency on the home that was destroyed in the hurricane. This is better than no bankruptcy option at all because at the end of the plan, the debtor will receive a discharge of the remaining amount owed on the deficiency claim. On the other

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[63] *See* 11 U.S.C. § 506(b) (2006) (bifurcating undersecured claims into a secured claim equal to the value of the collateral and an unsecured claim for the remainder; if the secured claim is, practically speaking, $0 as in our hypothetical, the remainder owed on the house loan will be a dischargeable unsecured debt).

[64] *Id.* § 1322(b)(2) (the Chapter 13 plan may "modify the rights of holders of secure claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence").

[65] *Id.* § 1325(a)(5)(C) (permitting a debtor to surrender collateral to secured creditor under the Chapter 13 plan as a means of satisfying the secured claim).

[66] *Id.* § 1325(b)(1) & (2).

hand, it is a very different result than under Chapter 7, where our "honest but unfortunate" hurricane victim could have turned the property over to the bank and received an immediate discharge, freeing themselves and their family to begin their financial lives anew. It is up to the reader to decide whether, in such a situation, the interest of creditors in receiving some recovery on their unsecured claims outweighs the debtor's interest in a fresh start. On that question turns the ultimate justice of BAPCPA which took away the Chapter 7 option for our hypothetical Katrina victim.

V. Conclusion, Or, How Katrina Demonstrates BAPCPA's Means Test Should Be Repealed

As I have argued elsewhere, a broad individual discharge is part of the economic and cultural environment necessary for entrepreneurship in our society.[67] The uniquely American expansion of the fresh start from merchants to individuals represents, in this hypothesis, a faith that all individuals are potential entrepreneurs and, therefore, ought to have the freedom to engage in the experimentation with heterogeneous capital that is at the heart of entrepreneurship.[68] Entrepreneurship and its fruit—the growth of knowledge in society—are so important that, in the case of the bankruptcy discharge, the individual may not contractually waive it before filing bankruptcy.[69] Such paternalism reflects a recognition of the central importance of entrepreneurship to our society, and the role of the bankruptcy discharge in fostering entrepreneurship.

This is not to say that individuals ought to be taking risks with other people's money and suffer no consequences. This brings us back to the "honest but unfortunate" debtor for whom, according to the Supreme Court, the fresh start is intended. The idea is that a person who plays by the rules and suffers a financial disaster through misfortune deserves a second chance,

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[67] Czarnetzky, *supra* note 7.

[68] *Id.* at 399.

[69] 11 U.S.C. § 727(10) (2006) (permitting waiver of Chapter 7 discharge only after the bankruptcy case is filed, with court authority).

a fresh start. Make no mistake—in exchange for that fresh start, the debtor must turn over all of their non-exempt assets for distribution to their creditors. Pre-BAPCPA, a Chapter 7 debtor with a job and above median income still suffered a financial disaster—they lost all their non-exempt assets before their debts were discharged—but that disaster ended with the bankruptcy. Post-BAPCPA, such a debtor must file a Chapter 13 case and the financial disaster continues in the form of a delayed fresh start. For the honest but unfortunate debtor, BAPCPA is a rejection of over one hundred years of faith in honest Americans to lead productive and valuable lives after a financial disaster that was not their fault.

The reactions to Hurricane Katrina, outlined *supra*, illustrate that the concern for the "honest but unfortunate" debtor survives, at least in some quarters. The sense of some members of Congress and, apparently, the EOUST, represents an intuition that victims of the greatest natural disaster in United States history are, to a very large extent, not responsible for the financial disaster that befell them in the storm's wake. This is altogether appropriate; however, we are shortsighted as a society if we do not see that the lesson of Katrina is that many if not most bankruptcy debtors suffer financial reversals through no fault of their own, though perhaps in a less dramatic fashion than a hurricane such as Katrina. Congress would do well to simply repeal BAPCPA rather than carve out special exceptions for natural disasters.[70]

After repeal, there are at least two relatively straightforward ways in which legitimate concerns about the abuse of the Code's generous discharge could be addressed. First, the Code already defines a number of ways in which a debtor may be denied a discharge in Chapter 7.[71] Congress could amend that section to provide courts much better guidance concerning which individuals through their pre-bankruptcy behavior should be denied a Chapter 7 discharge. Second,

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[70] This has been, wholly or in part, the suggestion of the scholarly commentary about the interplay of the BAPCPA and Hurricane Katrina. *See* Lawless, *supra* note 14, at 15; Sabella, *supra* note 14, at 324.

[71] *See* 11 U.S.C. § 727 (2006).

Congress could amend the Code to require bankruptcy judges and/or the UST[72] to make an initial determination in each Chapter 7 case that the individual debtor, based on their pre-bankruptcy behavior, is not the type of "honest but unfortunate" debtor deserving of a fresh start. Either of these options would, I believe, be preferable to the crude notion embodied in BAPCPA that those who have above median income are undeserving of an immediate fresh start. Indeed, properly crafted, either option likely would prevent more individuals from filing Chapter 7 cases than BAPCPA ever will,[73] and will permit the honest but unfortunate debtor who has "excess income" to an immediate fresh start. That is the traditional American result.

The lesson of Hurricane Katrina is that the solution to the abuse of the bankruptcy system's idealistic faith in the entrepreneurial spirit and capacities of the American people is not embodied in BAPCPA's means test—i.e., to penalize the very people who, given an immediate fresh start are more likely to engage in entrepreneurial activity to rebuild their lives; rather, Katrina's aftermath ought to focus Congress on defining exactly who is *not* the type of "honest but unfortunate" debtor that is central to that very American faith.

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[72] For example, the UST could use the 341 meeting held in every bankruptcy case to evaluate whether or not the debtor belongs in Chapter 7 because they were "honest but unfortunate" in their pre-bankruptcy affairs. *See id.* § 341.

[73] There is a scholarly dispute concerning the number of debtors who will be affected by the BAPCPA means test; the numbers vary from 3.6% to 15% of bankruptcy debtors. *See Bankruptcy Reform Act of 1998; the Responsible Borrower Protection Act; and the Consumer Lenders and Borrowers and Bankruptcy Accountability Act of 1998—Part II: Hearing on H.R. 315; H.R. 2500; and H.R. 3146 Before the S. Comm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 25-31 (1998) (statement of Thomas S. Neubig, Ernst & Young, LLP) (15%); Culhane & White, *supra* note 49, at 31-34 (3.6%).

DISASTER MEDIATIONS IN MISSISSIPPI: THE INFLUX OF PUBLIC ADJUSTERS INTO MISSISSIPPI AFTER HURRICANE KATRINA COMPELS THE MISSISSIPPI LEGISLATURE TO ENACT THE MISSISSIPPI PUBLIC ADJUSTER ACT

*Bobby Marzine Harges**

I. INTRODUCTION

Hurricane Katrina, which struck the Mississippi Gulf Coast in late August 2005, was the largest, most expensive insured disaster in the history of the United States.[1] Approximately 1.75 million claims were filed across six states.[2] Some 15,000 insurance claims adjusters were called in from across the country to begin the process of recovery.[3] As of February 2007, claims payments to restore homes, businesses, and vehicles have totaled nearly $40 billion.[4]

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[1] *Natural Disaster Insurance: Hearing on H.R. 91 and H.R. 920 Before the H. Fin. Servs. Subcomm. on Hous. & Cmty. Opportunity*, 110th Cong. (Mar. 27, 2007) (statement of Marc Racicot, President, Am. Ins. Co.), *available at* 2007 WLNR 5852346.

[2] *Id.*

[3] *Id.*

[4] *Id.*

In addition to the influx of insurance claims adjusters, public insurance adjusters rushed to the Gulf South. These public adjusters set about assisting policyholders with their damage assessments and their calculations of rebuilding costs. A public adjuster is a professional who is employed by a policyholder who has sustained an insured loss and helps the policyholder prepare and file insurance claims. According to the website of the National Association of Public Insurance Adjusters, public adjusters handle details of the claim such as inspecting the loss site, analyzing the damages, assembling the claim support data, reviewing the insured's coverage, and determining current replacement costs.[5] Unlike the claims adjuster who is employed by the insurance company and adjusts claims on behalf of the insurance company, or the independent adjuster, who is an independent contractor hired by an insurance company to inspect a homeowner's property and render an assessment of the damages, the public adjuster is employed by the policyholder to render similar services on behalf of the policyholder. In essence, a public adjuster is a building or construction related expert who has expertise in assessing damages for insurance purposes. Public adjusters usually publicize their services by informing potential clients that they work for the policyholder, not the insurance company; that they can help level the playing field between the insurance company and the policyholder; and that they will assist the policyholder to obtain a fair settlement. These professionals advertise the fact that they know the insurance process inside and out, that they can minimize the hassle that comes with collecting documents and evidence, and that they can assist the policyholder in negotiating with the insurance company.[6] Policyholders are told that the public adjuster will file all the pertinent paperwork with the insurance company, arrange for the inspections of the damaged property if needed, and then negotiate with the insurance company if it refuses to pay the full

[5] National Association of Public Insurance Adjusters, http://www.napia.com (last visited Jan. 15, 2008).

[6] *See Public Claims Adjusters Can Level the Playing Field for You*, INSURE.COM, June 26, 2002, http://info.insure.com/home/publicadjuster.html.

claim.[7] Public adjusters are typically compensated by the policyholder for these services via fees contingent on the outcome of the settlement unless otherwise mandated by state law.

Prior to 2005, public adjusters primarily worked in the Northeast, while not having much exposure in the South.[8] Further, in Mississippi, prior to Hurricane Katrina, there was no statutory scheme for recognizing, licensing or otherwise regulating public adjusters.[9] This all changed approximately two weeks after Hurricane Katrina struck the Mississippi Gulf Coast when Mississippi Department of Insurance Commissioner George Dale issued emergency guidelines governing the registration and other activities of public adjusters in Mississippi.[10] The public adjusters registration requirement[11] allowed public adjusters to practice on the Mississippi Gulf Coast under the state of emergency until the Mississippi Legislature was able to enact legislation that would enable public adjusters to operate legally and ethically in the state according to state law. The actions of the Mississippi Legislature resulted in the enactment of the Mississippi Public Adjuster Act.[12]

This article will discuss the regulation and licensing of public adjusters in the State of Mississippi following Hurricane Katrina. The actions of the Mississippi Department of Insurance, the Mississippi Attorney General, and the Mississippi Legislature will also be examined relative to their roles leading to the creation of the Act. Moreover this article will analyze the

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[7] *Id.*

[8] Peter C. Beller, *In the Wake of Disaster, Help for Hire*, N.Y. TIMES, Feb. 2, 2006, at F8.

[9] Public Adjusters, Op. Miss. Att'y Gen. No. 2005-0481, at 1 (Sept. 14, 2005), 2005 WL 3298154. However, claims adjusters and independent adjusters were regulated in Mississippi prior to Hurricane Katrina. *See* MISS. CODE. ANN. §§ 83-17-401 to -425 (West 2007) (originally enacted in 1993).

[10] *See infra* Section II.

[11] MISS. DEP'T OF INS., BULLETIN 2005-8, at 1 (Sept. 16, 2005) [hereinafter BULLETIN 2005-8], *available at* http://www.doi.state.ms.us/bulletins/20058bull.PDF.

[12] Mississippi Public Adjuster Act, MISS. CODE ANN. §§ 83-17-501 to -527 (Supp. 2007).

new Mississippi Public Adjuster Act that became effective on July 1, 2007. Finally, this article will discuss the types of activities that public adjusters may engage in under the Mississippi Public Adjuster Act outside of the traditional damage assessment such as negotiating with the insurance company representative on behalf of the policyholder.

II. THE MISSISSIPPI DEPARTMENT OF INSURANCE ISSUES EMERGENCY GUIDELINES GOVERNING THE REGISTRATION AND ACTIVITIES OF PUBLIC ADJUSTERS

Public adjusters were all but unheard of in Mississippi before Hurricane Katrina struck the Mississippi Coast.[13] After Hurricane Katrina, homeowners who wanted a second opinion on the assessment of their property damages related to Hurricane Katrina began hiring public adjusters to assist them in negotiating with insurance companies instead of relying solely on the potentially biased estimate of their damages by the insurance companies.[14] Some public adjusters, after coming to Mississippi, contacted the Mississippi Department of Insurance inquiring about the licensing and registration requirements for public adjusters.[15] In response to these inquiries, Insurance Commissioner George Dale sought guidance from Mississippi Attorney General Jim Hood about whether Commissioner Dale had the legal authority to recognize, license, or regulate public adjusters in Mississippi.[16] Commissioner Dale also inquired about whether the practice of public adjusting constituted the unauthorized practice of law in Mississippi.[17] In his response to Commissioner Dale, Attorney General Hood informed the Commissioner that, in light of the state of emergency declared

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[13] Geoff Pender, *Legislative Roundup: Bill Wants Licenses for Year*, SUN HERALD, Feb. 6, 2007, at A5.

[14] *Id.*

[15] E-mail from Kim Causey, Special Assistant Attorney General, on behalf of George Dale, Mississippi Commissioner of Insurance, to Bobby Marzine Harges, Adams and Reese Distinguished Professor of Law II, Loyola University New Orleans College of Law (July 18, 2007, 15:26:27 CST) (on file with author).

[16] Public Adjusters, *supra* note 9, at 1.

[17] *Id.* at 2.

by Mississippi Governor Haley Barbour in areas of Mississippi affected by Hurricane Katrina, Commissioner Dale had the legal authority to establish emergency guidelines and to provide for the registration of public adjusters for the duration of the state of emergency.[18]

On September 16, 2005, two days after the Official Opinion of Attorney General Hood was rendered and about two weeks after Hurricane Katrina struck the Mississippi Gulf Coast, Commissioner Dale issued Bulletin 2005-8, which established emergency guidelines governing the registration and other activities of public adjusters in Mississippi.[19] This registration requirement was initially scheduled to cease on May 31, 2006, but Bulletin 2005-8 was subsequently amended to extend the registration requirement to May 31, 2007.[20]

Another question that Commissioner Dale posed to Attorney General Hood was whether the Mississippi Department of Insurance had the authority to limit the compensation received by public adjusters in Mississippi. In response to this question, Attorney General Hood stated that the emergency authority granted to Commissioner Dale in the wake of Hurricane Katrina included the authority to limit the fees charged by public adjusters working in Mississippi during the state of emergency.[21] Attorney General Hood's response noted that Florida had recently adopted an emergency rule to protect victims of Hurricane Katrina by capping public adjusters' fees and taking other protective measures.[22] Acting on this clarification of his authority, Commissioner Dale issued a bulletin that capped public adjusters' fees at seven percent, apparently to protect Mississippi's Hurricane Katrina victims from potential abuses by public adjusters. In Bulletin 2005-8, as amended, Commissioner Dale stated that no emergency public

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[18] *Id.* at 2-3.

[19] BULLETIN 2005-8, *supra* note 11, at 1.

[20] MISS. DEP'T OF INS., BULLETIN 2006-10, CLARIFICATION OF BULLETIN 2005-8, AS AMENDED 1-2 (Aug. 21, 2006) [hereinafter BULLETIN 2006-10], *available at* http://www.doi.state.ms.us/bulletins/200610bull.pdf.

[21] Public Adjusters, *supra* note 9, at 3.

[22] *Id.*

adjuster could charge, agree to, or accept as compensation any payment, commission, or fee that was equal to or more than seven percent of any insurance settlement or proceeds.[23] Apparently, the concern of the Mississippi Department of Insurance was that unscrupulous public adjusters would enter the State of Mississippi and charge exorbitant fees, thus taking unfair advantage of policyholders who had already suffered unspeakable damage from Hurricane Katrina.

A final question that Commissioner Dale asked Attorney General Hood was whether the practice of public adjusting constituted the unauthorized practice of law (UPL) in Mississippi.[24] To answer the UPL concern, Attorney General Hood considered the tasks that public adjusters perform. Then Attorney General Hood analyzed Section 73-3-55,[25] Mississippi's UPL statute, to determine if the activities of public adjusters conflicted with the UPL statute.[26] In the Attorney General's Opinion, "'public adjusters' perform various casualty loss-related activities on behalf of [policyholders], including estimating losses, preparing inventories, assisting [policyholders] in preparing proofs of loss, delivering documentation to insurance companies, and supporting the [policyholder's] property-damage valuations."[27] According to Attorney General Hood, if the duties of public adjusters are limited as defined above, then the practice of public adjusting is not the unauthorized practice of law per se.[28] Thus, under the emergency guidelines issued by Commissioner Dale, the actions of public adjusters did not

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[23] BULLETIN 2006-10, *supra* note 20, at 2. After receiving complaints from policyholders about problems they had with their public adjusters, Commissioner Dale later issued Bulletin 2006-10 which, in part, clarified what the contingent fee charged by emergency public adjusters could be based on. Bulletin 2006-10 stated that it was implicit in the terms of Bulletin 2005-8, as amended, that any fee charged by an emergency public adjuster could only be based upon the settlement or monies he or she actually adjusted, and that the fee could not be charged on any settlement or monies that the policyholder agreed to, received, or negotiated prior to retaining the emergency public adjuster. *Id.*

[24] Public Adjusters, *supra* note 9, at 2.

[25] MISS. CODE ANN. § 73-3-55 (2006). *See infra* note 100.

[26] Public Adjusters, *supra* note 9, at 3-4.

[27] *Id.* at 2.

[28] *Id.*

constitute the unauthorized practice of law in Mississippi.

Perhaps the setting where public adjusters were most notably visible was in the hurricane mediations, or disaster mediations, conducted at the University of Southern Mississippi in a program created by the Mississippi Department of Insurance (MDOI) and administered by the American Arbitration Association. This program was designed to help resolve personal lines residential insurance claims arising from damages to residential property caused by Hurricane Katrina.[29] Under MDOI Emergency Regulation No. 2005-2, mediation was available to all first party claimants prior to commencing either litigation or the appraisal process.[30] The mediation process is defined as follows:

> Mediation is a dispute resolution process that uses a trained neutral third party—a mediator—to assist the parties in resolving their dispute. Unlike an arbitrator, who has the authority to render a binding decision, the mediator has no power to bind the parties. The function of the mediator is to assist the parties in reaching a settlement.[31]

Homeowners appeared at the mediations seeking additional settlement funds from their insurance companies as a result of the wind damage caused by Hurricane Katrina and covered by their insurance policies.[32] At the mediations, many insurance companies claimed that much of the damage was caused by flood-waters, and that this damage was not covered under the terms of the policyholders' insurance policies.[33] While most policyholders appeared at the mediations without representation at all, between ten percent and twenty-five percent were

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[29] MISS. DEP'T OF INS., REG. NO. 2005-2, AS AMENDED, SPECIAL MEDIATION PROGRAM FOR PERSONAL LINES RESIDENTIAL INSURANCE CLAIMS RESULTING FROM HURRICANE KATRINA § 1 (July 17, 2006) [hereinafter REGULATION 2005-2], *available at* http://www.doi.state.ms.us/regulations/20052dreg.pdf.

[30] *Id.* § 2.

[31] Bobby Marzine Harges, *ABCs of Effective ADR, Ten Practical Tips for Representing Clients in Mediations*, 43 LA. B.J. 142, 142 (1995).

[32] Jeff Weill, Sr., *Katrina Mediation: Getting It Done One House At a Time*, MISS. LAWYER, 2006-07, at 12.

[33] *Id.* at 13.

represented by public adjusters.[34] In fact, more policyholders were represented by public adjusters at the mediations than by attorneys.[35]

With the presence of public adjusters in Mississippi being virtually non-existent before Hurricane Katrina and their increased prevalence after the storm, the need for licensing and regulation of public adjusters became obvious. Consequently, the Mississippi Legislature responded to this need and enacted the Mississippi Public Adjuster Act during the 2007 regular session.[36]

III. THE MISSISSIPPI PUBLIC ADJUSTER ACT

The purpose of the Mississippi Public Adjuster Act (MPAA) is to give the Insurance Commissioner authority to license and regulate public adjusters.[37] Other goals of the MPAA include assuring that contracts between a public adjuster and an insured are in writing, that the public adjuster's compensation is limited, and that ethical requirements are created.[38] The MPAA covers a multitude of topics including definitions, pre-licensing requirements, the license application process, exemptions from the exam, reciprocity, license renewal, creation of an emergency public adjuster category, continuing education

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[34] The author interviewed three hurricane mediators who mediated these claims in Hattiesburg, Mississippi, under the program created by the Mississippi Department of Insurance. The three mediators were Bill Lutz, Sr., Jeff Weill, Sr., and Ed Prisock. Jeff Weill, Sr., and Ed Prisock estimated that in approximately ten percent of the cases they mediated, policyholders were represented by public adjusters, while Bill Lutz estimated that close to twenty-five percent of the policyholders in the cases he mediated were represented by public adjusters. Telephone Interview with Jeff Weill, Sr., Hurricane Mediator, Miss. Dep't of Ins. Mediation Program, in Jackson, Miss. (May 24, 2007); Telephone Interview with Ed Prisock, Hurricane Mediator, Miss. Dep't of Ins. Mediation Program, in Jackson, Miss. (June 11, 2007); Telephone Interview with Bill Lutz, Sr., Hurricane Mediator, Miss. Dep't of Ins. Mediation Program, in Jackson, Miss. (June 11, 2007).

[35] *See supra* note 34 and accompanying text.

[36] Mississippi Public Adjuster Act, MISS. CODE ANN. §§ 83-17-501 to -527 (Supp. 2007).

[37] Mississippi Public Adjuster Act, ch. 497, 2007 Miss. Laws 738. *See also* FLA. STAT. ANN. § 626.854 (West 2004 & Supp. 2007) (enacting similar public adjuster regulations to protect the public and to prevent the unauthorized practice of law).

[38] Mississippi Public Adjuster Act, ch. 497, 2007 Miss. Laws 738.

requirements, penalties for violations of the MPAA, the disciplinary process and appeal, and an effective date.[39] This section of the article will examine a few of the most important topics covered by the MPAA.

A. Mississippi Department of Insurance Issues Regulation 2007-4 To Provide Guidance for Licensure and Regulation of Public Adjusters

The MPAA gives the Commissioner of the MDOI the authority to make any necessary rules and regulations to administer the MPAA.[40] With this authority, Commissioner Dale issued MDOI Regulation 2007-4. Much of the language of the MPAA was adopted in this regulation, but the continuing education requirements were expounded on[41] and the Business Entity Public Adjuster License,[42] the five year record-keeping requirement,[43] the surety bond requirement,[44] the requirements of a written contract,[45] and the severability provision were added.[46]

Under the MPAA, all persons[47] practicing as public adjusters in the State of Mississippi must be licensed by the MDOI.[48] To be licensed, the applicant must successfully pass a written licensing examination or, if the applicant has passed a

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[39] Mississippi Public Adjuster Act, MISS. CODE ANN. §§ 83-17-501 to -527 (Supp. 2007).

[40] *Id.* § 527.

[41] MISS. DEP'T OF INS., REG. NO. 2007-4, LICENSURE AND REGULATION OF PUBLIC ADJUSTERS § 7 (May 11, 2007) [hereinafter REGULATION 2007-4], *available at* http://www.doi.state.ms.us/regulations/20074reg.pdf.

[42] *Id.* § 5(B).

[43] *Id.* § 10(A)(5). *See also* D.C. CODE § 31-1631.06(b) (LexisNexis Supp. 2006) (requiring records for at least five years from the termination of the transaction with an insured); MICH. COMP. LAWS ANN. § 500.1228(2) (West 2002) (six years after termination); NEV. REV. STAT. ANN. § 684A.180(3) (LexisNexis 2003 & Supp. 2005) (at least 3 years).

[44] REGULATION 2007-4, *supra* note 41, at Exhibit "A."

[45] *Id.* at Exhibit "B."

[46] *Id.* § 11.

[47] Attorneys practicing as public adjusters do not have to be licensed. Mississippi Public Adjuster Act, MISS. CODE ANN. § 83-17-501(e)(iii) (Supp. 2007).

[48] REGULATION 2007-4, *supra* note 41, § 3; Mississippi Public Adjuster Act § 503(1).

written exam in another state that has reciprocity with Mississippi, the applicant will be exempt from the exam.[49] There are three types of licenses: the Individual Public Adjuster License, the Emergency License, and the Business Entity Public Adjuster License. The Individual Public Adjuster License[50] is for the average public adjuster who adjusts claims in Mississippi fairly regularly. The Emergency License[51] may be issued by the Insurance Commissioner in an extraordinary event where the quantity of Individual Public Adjusters may not be sufficient to satisfy the public need. The Business Entity Public Adjuster License[52] is a license given to a business entity acting as a public adjuster, and is subject to the same terms and conditions as an Individual Public Adjuster Licensee.

B. Requirements for Public Adjuster Contract

The MPAA requires that contracts for public adjuster services be in writing, that signatures by both the insured and the public adjuster appear on the contract, and that a copy of the contract be tendered to the insured upon the public adjuster's execution of the contract.[53] The contents of the written contract are subject to other requirements to be valid.[54] To provide guidance to public adjusters, the Commissioner of Insurance published specific guidelines detailing the elements necessary to constitute a sufficient writing.[55] The writing requirement is an important protection for the consumer against unscrupulous public adjusters; because it places the consumer on notice of the details of the relationship contemplated between the parties,

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[49] Mississippi Public Adjuster Act § 511(e); REGULATION 2007-4, *supra* note 41, § 5(A)(1)(e).

[50] REGULATION 2007-4, *supra* note 41, § 5(A).

[51] *Id.* § 5(C).

[52] Mississippi Public Adjuster Act § 523.

[53] REGULATION 2007-4, *supra* note 41, § 10(A); Mississippi Public Adjuster Act § 12(1).

[54] Mississippi Public Adjuster Act § 523(1)(a)-(d); REGULATION 2007-4, *supra* note 41, § 10(A)(1)-(6). To be valid, the written contract must not violate any of the subsections and it must include any disclosures required by the subsections. REGULATION 2007-4, *supra* note 41, at Exhibit "B."

[55] REGULATION 2007-4, *supra* note 41, at Exhibit "B."

and gives the consumer or the public adjuster evidence of the service agreement should any disagreements occur in the future.

The MPAA prohibits a public adjuster from charging a fee that is equal to or more than ten percent of any insurance settlement or proceeds on any claim investigated.[56] Therefore, a flat fee would be valid as long as it does not equal to or exceed ten percent of the insurance settlement or proceeds on the investigated claim. Moreover, the MPAA requires any costs to be reimbursed to the public adjuster to be specified by kind and estimated amounts in the written contract.[57] Finally, public adjusters are prohibited from receiving anything of value from the insured prior to partial or full settlement of the claim.[58] Thus, the public adjuster is prohibited from asking for a deposit or requiring progress payments, even if the public adjuster charges a flat fee.

C. Ethical Requirements

The MPAA imposes ethical requirements on public adjusters who are licensed in the State of Mississippi. Under the MPAA, public adjusters must be competent and capable of adjusting claims that do not go beyond the adjuster's experience or knowledge level.[59] Furthermore, the public adjuster may not represent any person or entity whose claim the public adjuster previously adjusted while serving as an adjuster representing any insurer.[60]

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[56] *See* Mississippi Public Adjuster Act § 523(1)(a); REGULATION 2007-4, *supra* note 41, § 10(A)(1). *But see* BULLETIN 2006-10, *supra* note 20, at 2 (limiting compensation at seven percent before the MPAA passed).

[57] REGULATION 2007-4, *supra* note 41, § 10(A)(3); Mississippi Public Adjuster Act § 523(c).

[58] Mississippi Public Adjuster Act § 523(1); REGULATION 2007-4, *supra* note 41, § 10(A)(2).

[59] Mississippi Public Adjuster Act § 523(2)(a); REGULATION 2007-4, *supra* note 41, § 10(B)(1).

[60] Mississippi Public Adjuster Act § 523(2)(b); REGULATION 2007-4, *supra* note 41, § 10(B)(2). Section 523(2)(b) of the MPAA actually reads, "[n]o public adjuster shall, as a public adjuster, represent any person or entity whose claim the public adjuster has previously adjusted while acting as an independent adjuster representing any insurer, either directly or through an independent adjusting firm retained by the insurer." Mississippi Public Adjuster Act § 523(2)(b). When read literally, this section seems to

Public adjusters are also prohibited from making false and injurious material misrepresentations about those engaged in the business of insurance.[61] In an effort to prevent public adjusters from taking advantage of clients by simply entering into contracts with clients who have sustained a total loss, the MPAA bars a public adjuster from entering into a contract with an insured where the loss has already been declared by the insurer as a total loss, unless the public adjuster reasonably believes that his or her services will result in a settlement in excess of the total loss, net of the adjuster's fee.[62] In other words, a public adjuster must provide a benefit to the insured to be compensated. This ethical requirement prevents a public adjuster from charging the insured for services that do not merit compensation.

D. Other Notable Provisions in the MPAA

Aside from the main purposes of the MPAA, there are other important provisions that deserve mention. The public adjuster's license is valid from June 1st to May 31st and is renewed annually.[63] Each year, the public adjuster must complete twelve hours of continuing education as specified by the Commissioner of Insurance.[64] The Commissioner of Insurance may levy fines

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prohibit a public adjuster who previously adjusted a person's or entity's claim as an "independent adjuster" from currently serving as the client's or entity's public adjuster. However, this section does not seem to prohibit a public adjuster who previously adjusted a person's or entity's claim while serving as a "company adjuster" or "claims adjuster." In the author's opinion, because of the conflict of interest that will arise, the statute should be read to prohibit a public adjuster from adjusting the claim of any client whose claim the public adjuster has previously adjusted whether the public adjuster was acting on behalf of any insurer while serving as a company or claims adjuster or as an independent adjuster.

[61] Mississippi Public Adjuster Act § 523(2)(c); REGULATION 2007-4, *supra* note 41, § 10(B)(3).

[62] Mississippi Public Adjuster Act § 523(2)(d); REGULATION 2007-4, *supra* note 41, § 10(B)(4). *See also* CONN. GEN. STAT. ANN. § 38A-726 (West 2007) (prohibiting a public adjuster from charging or collecting a fee if an insurance company offers to pay the full policy limits to the insured within thirty days of a loss to a structure covered by a fire insurance policy).

[63] REGULATION 2007-4, *supra* note 41, § 5(A)(2).

[64] *Id.* § 7.

and penalties on the public adjuster for violations of the MPAA or Regulation 2007-4.[65] A public adjuster's license is suspended upon notice of a hearing on an alleged violation.[66] If the final disposition is a finding of a violation, the ultimate penalty is not to be in excess of $5,000.[67]

The scope of the public adjuster's practice is limited by the MPAA to adjusting first-party claims arising under policies insuring real or personal property of the insured.[68] Thus when a public adjuster exceeds the scope of the MPAA by negotiating personal injury claims with insurance companies, the public adjuster arguably is engaging in the unauthorized practice of law.[69]

The written public adjuster contract must contain information about the five-day revocation period, which allows the insured to revoke the contract with the public adjuster within five business days of the execution of the contract without having to state a cause for the revocation.[70] A written contract that does not inform the insured about a revocation period could be found to be invalid and unenforceable. However,

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[65] *Id.* § 9 (addressing specific violations).

[66] *Id.* § 9(B).

[67] *Id. See also* FLA. STAT. ANN. § 626.8698 (West 2004 & Supp. 2007) (imposing a similar fine of up to $5,000 per violation).

[68] REGULATION 2007-4, *supra* note 41, § 4(E)(1); Mississippi Public Adjuster Act § 501(e)(i); *but see* UTAH CODE ANN. § 31A-26-204(2) (2005) (allowing multiple classifications of public adjuster's licenses, including accident and health insurance, property and liability insurance, service insurance, title insurance, credit insurance, workers' compensation insurance, and other classifications the commissioner may create).

[69] *See, e.g.*, La. Claims Adjustment Bureau, Inc. v. State Farm Ins. Co., 877 So. 2d 294 (La. Ct. App. 2004) (public insurance adjusting agency that acted on behalf of individuals as a "third party adjuster" in the negotiation of personal injury claims with insurance companies was engaged in the unauthorized practice of law in Louisiana).

[70] Mississippi Public Adjuster Act § 523(1)(d) ("A public adjuster's contract with the insured shall be revocable or cancelable by the insured without cause and without penalty or obligation for at least five (5) business days after the contract is executed by the insured."); REGULATION 2007-4, *supra* note 41, §§ 10(A)(4), (6) ("The insured shall have the right to revoke the contract within five (5) business days after execution . . . . Exhibit 'B' is attached hereto containing all required provisions for use by public adjusters in their contracts."). Exhibit "B" of the Department of Insurance's guidelines for public adjusters states that the required written contract must contain language about the five-day revocation period. REGULATION 2007-4, *supra* note 41, at Exhibit "B."

if the insured exercises the right to revoke the contract within the revocation period and the public adjuster has already begun work and incurred expenses, then the insured should be liable to the public adjuster for the reasonable value of the public adjuster's necessary expenses and services. Nevertheless, if the public adjuster is violating the MPAA, then the contract should be void and the insured may not have to compensate the public adjuster.

The MPAA also contains a few provisions relative to public adjusters and lawyers. First, the public adjuster has a duty to advise each insured of the insured's right to retain an attorney of his choice throughout the investigation and adjustment of the claim.[71] However, the public adjuster is forbidden from referring an insured to any particular attorney.[72] And if the case is not settled by the public adjuster, he has a statutory duty to advise the insured again that the insured has the right to retain an attorney of his choice.[73] Furthermore, no public adjuster is allowed to receive a referral or finder's fee from an attorney to whom the public adjuster has referred a claim, whether or not the public adjuster will be adjusting the claim.[74] Another prohibition prohibits public adjusters from splitting attorney's fees with attorneys.[75] These regulations are apparently an effort to protect the consumer by attempting to prevent public adjusters from soliciting cases for specific lawyers.

In an attempt to prevent a public adjuster from maintaining a pecuniary interest in a matter where he may testify as an expert witness, the MPAA prohibits a public adjuster from testifying as an expert witness in any judicial or administrative proceeding where his fee is contingent on the outcome of the proceeding.[76] The belief is that a contingency fee would give the public adjuster a strong incentive to testify falsely. However, in the event that a public adjuster converted

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[71] Mississippi Public Adjuster Act § 523(2)(e).

[72] *Id.*

[73] *Id.* § 523(2)(f).

[74] *Id.* § 523(2)(g).

[75] *Id.* § 523(2)(h).

[76] *Id.* § 523(2)(i).

his contingency fee, as allowed by Section 83-17-523(a) of the MPAA, to an hourly rate[77] because of his testimony as an expert witness, the prior fee arrangement shall be inadmissible at the trial.[78]

IV. THE REGULATION OF PUBLIC ADJUSTERS IN OTHER STATES

As of July 1, 2007, thirty-nine states and the District of Columbia regulate public adjusters.[79] Of the Gulf Coast states, only Alabama does not regulate public adjusters.[80] Some states'

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[77] Specified by the Commissioner of Insurance to be a specific hourly rate of fifty dollars per hour. REGULATION 2007-4, *supra* note 41, § 10(B)(9)(a).

[78] *Id.* This provision is in accord with prior Mississippi law. For example, the Comment to Rule 3.4(b) of the Mississippi Rules of Professional Conduct, Disciplinary Rule 7-109(c), and Ethical Consideration 7-28, state that it is improper to pay an expert witness a contingent fee. *See* Caston v. State, 823 So. 2d 473, 490-91 (Miss. 2002); Woodward v. State, 726 So. 2d 524, 542 (Miss. 1997). *See also* United States v. Bagley, 473 U.S. 667 (1985).

[79] ARIZ. REV. STAT. ANN. § 20-321 (2002 & Supp. 2006); CAL. INS. CODE §§ 15000-62 (West 2005 & Supp. 2007); COLO. REV. STAT. § 10-2-417 (2007); CONN. GEN. STAT. ANN. §§ 38A-723 to -739 (West 2007); DEL. CODE ANN. tit. 18, §§ 1750-61 (Supp. 2006); D.C. CODE §§ 31-1631.01-.12 (LexisNexis Supp. 2006); FLA. STAT. ANN. §§ 626.851-.8795 (West 2004 & Supp. 2007); GA. CODE ANN. §§ 33-23-1 to -46 (2005 & Supp. 2006); HAW. REV. STAT. §§ 431:9-101 to 9-243 (2005 & Supp. 2006); 215 ILL. COMP. STAT. ANN. 5/512.51-.64 (West 2000 & Supp. 2007); IND. CODE ANN. § 27-1-27-1 to -11 (LexisNexis 1999 & Supp. 2006); KY. REV. STAT. ANN. §§ 304.9-010 to -490 (LexisNexis 2006); LA. REV. STAT. ANN. §§ 22:1210.91-.108 (Supp. 2007); ME. REV. STAT. ANN. tit. 24-A, §§ 1471-76 (2000 & Supp. 2006); MD. CODE ANN., INS. §§ 10-401 to -410 (LexisNexis 2003 & Supp. 2006); MASS. GEN. LAWS ANN. ch. 175, § 172 (West 1998 & Supp. 2007); MICH. COMP. LAWS ANN. §§ 500.1222-.1228 (West 2002); MINN. STAT. ANN. §§ 72B.01-.14 (West 2005 & Supp. 2007); MISS. CODE ANN. §§ 83-17-501 to -527 (Supp. 2007); MO. ANN. STAT. §§ 325.010-.055 (West 2001); MONT. CODE ANN. § 33-17-301 (2007); NEB. REV. STAT. ANN. §§ 44-2606 to -2635 (LexisNexis 2004); NEV. REV. STAT. ANN. §§ 684A.010-.260 (LexisNexis 2003 & Supp. 2005); N.H. REV. STAT. ANN. §§ 402-D:1-21 (Supp. 2006); N.J. STAT. ANN. §§ 17:22B-1 to -20 (West 2007); N.M. STAT. ANN. §§ 59A-11-1 to -21 (West 2007); N.Y. INS. LAW §§ 2101-36 (McKinney 2006 & Supp. 2007); N.C. GEN. STAT. ANN. §§ 58-33-1 to -135 (West 2005); OHIO REV. CODE ANN. §§ 3951.01-.99 (LexisNexis 2002 & Supp. 2007); OKLA. STAT. ANN. tit. 36, §§ 6201-21 (1999 & Supp. 2007); OR. REV. STAT. §§ 744.001-.051 (2001); 63 PA. STAT. ANN. §§ 1601-08 (West 1996 & Supp. 2007); R.I. GEN. LAWS §§ 27-10-1 to -15 (2002 & Supp. 2006); S.C. CODE ANN. §§ 38-48-10 to -160 (2002 & Supp. 2006); TENN. CODE. ANN. §§ 56-6-901 to -920 (Supp. 2007); TEX. INS. CODE ANN.§§ 4102.001-.208 (Vernon 2007); UTAH CODE ANN. §§ 31A-26-201 to -215 (2005 & Supp. 2007); VT. STAT. ANN. tit. 8, §§ 4800-26 (2005 & Supp. 2006); WASH REV. CODE §§ 48.17.010-.901 (West 1999 & Supp. 2007); W. VA. CODE ANN. §§ 33-12B-1 to -14 (LexisNexis 2006 & Supp. 2007).

[80] Telephone Interview with Roddy Jerkins, Public Adjuster, in New Orleans, La.

regulations of public adjusters are long, detailed, and complex,[81] while others' are short and only set forth basic rules.[82] Comparatively, Mississippi regulations are about average in complexity and length. Virtually all regulations have some common elements, such as definitions of public adjusters and licensing requirements. This section will discuss differences between the MPAA and the acts regulating public adjusters in other states.

The MPAA does not regulate when a public adjuster can approach an insured to solicit business. A majority of states do not put such restrictions on public adjusters. However, the restrictions created by the minority of states are diverse. Delaware simply requires that the loss-producing event be finished before a public adjuster may solicit the insured.[83] California sets forth more specific guidelines.[84] For example, in addition to requiring the loss-producing event to be finished, a public adjuster is prohibited from soliciting clients between the hours of six p.m. and eight a.m.[85] Also, if a disaster strikes California, public adjusters may not solicit disaster victims until seven days have passed from the time of the disaster.[86] Mississippi could add a similar provision so that if another major hurricane strikes, disaster victims would be protected from the potential abuses by public adjusters preying on hurricane victims when they are still in shock from the destruction, and are therefore emotional and vulnerable. However, such a provision may be a disservice to disaster victims because public adjusters would not be able to find those forces to move to temporary unlisted locations. Disaster victims would therefore be denied access to public adjusters. Similar arguments were made in *Insurance Adjustment Bureau v.*

(June 14, 2007). The author was unable to find any Alabama statutes or regulations governing public adjusters. *See* Ala. Dep't of Ins. Frequently Asked Questions, www.aldoi.gov/FAQ.aspx (last visited Jan. 29, 2008).

[81] *See, e.g.*, FLA. STAT. ANN. §§ 626.851 - .8795 (West 2004 & Supp. 2007).

[82] *See, e.g.*, CONN. GEN. STAT. ANN. §§ 38A-723 to -730 (West 2007).

[83] DEL. CODE ANN. tit. 18, § 1756(c) (Supp. 2006).

[84] CAL. INS. CODE § 15027.1 (West 2005 & Supp. 2007).

[85] *Id.*

[86] *Id.*

Insurance Commissioner.[87] The issue rested on whether a Pennsylvania statute restricting public adjusters' rights to solicit within twenty-four hours of a disaster or fire was unconstitutional as a matter of Pennsylvania law because it burdened free speech rights.[88] The Pennsylvania Supreme Court found the regulation unconstitutional because the public was already protected from these abuses by fines and penalties that the Insurance Commissioner could levy against public adjusters for violating regulations without having to restrict the public adjuster's right to free commercial speech.[89] Like Pennsylvania, Mississippi has stipulated fines for violations of the MPAA.[90] However, Mississippi could also create a provision regulating when public adjusters could solicit after a hurricane. People tend to evacuate their homes in the wake of a powerful hurricane and do not return for some time after the hurricane passes. Public adjusters would not be hurt by the provision because there would be few people to solicit during and immediately after the hurricane. Such a provision would help people who choose not to evacuate by giving them a chance to collect their thoughts before engaging into a contractual relationship with a public adjuster.

Similarly, Mississippi does not specifically regulate advertisements by public adjusters. Texas requires the license holder's name, address, and license number on every advertisement utilized by the public adjuster.[91] Florida only requires that the advertisement not have misrepresentations or deceive the public.[92] Public adjuster advertisements in South Carolina are not to "create an unjust expectation about results the public adjuster can achieve."[93]

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[87] Ins. Adjustment Bureau v. Ins. Comm'r, 542 A.2d 1317, 1318 (Pa. 1988).

[88] *Id. See also* 63 PA. STAT. ANN. § 1605(a) (West 1996 & Supp. 2007).

[89] *Ins. Adjustment Bureau*, 542 A.2d at 1323-24.

[90] Mississippi Public Adjuster Act, MISS. CODE ANN. § 83-17-519 (Supp. 2007).

[91] TEX. INS. CODE ANN. § 4102.113 (Vernon 2007).

[92] FLA. STAT. ANN. § 626.8697(h)(3) (West 2004 & Supp. 2007).

[93] S.C. CODE ANN. § 38-48-100 (2002 & Supp. 2006). *See also* Linder v. Ins. Claims Consultants, Inc., 560 S.E.2d 612, 622 (S.C. 2002) (holding that a public adjuster engages in the practice of law if he or she uses advertising that implies to consumers that the public adjuster provides services requiring legal skill).

The MPAA requires public adjusters to show evidence of financial responsibility by requiring all public adjusters to obtain a surety bond in the amount of $50,000.[94] While twenty-one jurisdictions do not require a surety bond at all, a large number of the nineteen that have such a provision require a $10,000 surety bond.[95] Mississippi is one of only four states to have a $50,000 bond requirement, the highest for public adjusters in any state. The bond requirement seems reasonable considering that two other Gulf Coast states also have a $50,000 bond requirement.[96] Mississippi's bond requirement appears to be following a trend in recent public adjuster acts requiring $50,000 bonds.[97]

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[94] Authorized by Section 527, and further specified in Exhibit "A" of Mississippi Department of Insurance Regulation 2007-4.

[95] Six states have a surety bond requirement of $10,000. IND. CODE ANN. § 27-1-27-4(e) (LexisNexis 1999 & Supp. 2006); MINN. STAT. ANN. § 72B.04(4) (West Supp. 2007); N.J. STAT. ANN. § 17:22B-12 (West 2007); OKLA. STAT. ANN. tit. 36, § 6214(A) (1999); HAW. REV. STAT. § 431:9-223 (2005); MO. ANN. STAT. § 325.020(1) (West 2001). Four states require a $5,000 surety bond. 215 ILL. COMP. STAT. ANN. 5/512.56 (West 2000); GA. COMP. R. & REGS. 120-2-3.18 (2007) (noting that GA. COMP. R. & REGS. 120-2-2.14 (1981) and GA. COMP. R. & REGS. 120-2-2.20, Exhibit "M" (1965), state a $2,500 bond); MONT. ADMIN. R. 6.6.1611 (2008); WASH REV. CODE § 48.17.430(1) (West 1999). Four states require a $50,000 surety bond. REGULATION 2007-4, *supra* note 41, § 7; LA. REV. STAT. ANN. § 22:1210.101 (Supp. 2007); TENN. CODE. ANN. § 56-6-911(1)(A) (Supp. 2007); FLA. STAT. ANN. § 626.865(2) (West 2004 & Supp. 2007). Three states require a $20,000 surety bond. DEL. CODE ANN. tit. 18, § 1752 (Supp. 2006); D.C. CODE § 31-1631.05 (Supp. 2006); N.H. REV. STAT. ANN. § 402-D:11(I)(a)(1) (Supp. 2006) (requiring at least $20,000). One state requires a $1,000 surety bond. OHIO REV. CODE ANN. § 3951.06(D) (LexisNexis 2002 & Supp. 2007). One state requires a $40,000 surety bond. 63 PA. STAT. ANN. § 1604(a) (West 1996 & Supp. 2007).

[96] Louisiana, a Gulf Coast state, requires the surety bond to be in the amount of $50,000. LA. REV. STAT. ANN. § 22:1210.101 (Supp. 2007). Florida, another Gulf Coast state, requires public adjusters to procure a $50,000 surety bond. FLA. STAT. ANN. § 626.865(2) (West 2004 & Supp. 2007).

[97] Louisiana, whose public adjuster statute became effective on June 30, 2007, one day before the MPAA became effective, has a $50,000 bond requirement. LA. REV. STAT. ANN. § 22:1210.101 (Supp. 2007). While not a Gulf Coast state, Tennessee also has a $50,000 bond requirement. TENN. CODE. ANN. § 56-6-911(1)(A) (Supp. 2007). Tennessee's Public Adjuster Licensing Act became effective on July 1, 2007, the same day as the MPAA. *Id.* § 56-6-901.

V. WHAT ACTIVITIES OF PUBLIC ADJUSTERS ARE AUTHORIZED UNDER THE MISSISSIPPI PUBLIC ADJUSTER ACT?

As a result of the new laws, exactly what types of activities can licensed public adjusters conduct in the State of Mississippi? A licensed public adjuster in Mississippi is now allowed to assist policyholders solely in relation to first party claims arising under insurance contracts that insure real or personal property.[98] Thus, the MPAA allows public adjusters to negotiate for and/or effect settlements on behalf of insureds relative to claims for loss or damage to real or personal property covered by an insurance contract.[99] These negotiations can take place over the telephone, in person, through the mail, or by electronic means. Furthermore, while a public adjuster may now assist a policyholder in a mediation by analyzing damages, explaining details of the claim, assembling the claim support data, and determining current replacement costs, the public adjuster is not allowed to render legal advice to the insured or engage in the unauthorized practice of law as defined in Section 73-3-55 of the Mississippi Code.[100]

Thus, public adjusters may assist the client in preparing for

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[98] Mississippi Public Adjuster Act, MISS. CODE ANN. § 83-17-501(e) (Supp. 2007).

[99] *Id.*

[100] MISS. CODE ANN. § 73-3-55 (2004) states:

> It shall be unlawful for any person to engage in the practice of law in this state who has not been licensed according to law. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in accordance with the provisions of section 97-23-43. Any person who shall for fee or reward or promise, directly or indirectly, write or dictate any paper or instrument of writing, to be filed in any cause or proceeding pending, or to be instituted in any court in this state, or give any counsel or advice therein, or who shall write or dictate any bill of sale, deed of conveyance, deed of trust, mortgage, contract, or last will and testament, or shall make or certify to any abstract of title or real estate other than his own or in which he may own an interest, shall be held to be engaged in the practice of law. This section shall not, however, prevent title or abstract of title guaranty companies incorporated under the laws of this state from making abstract or certifying titles to real estate where it acts through some person as agent, authorized under the laws of the State of Mississippi to practice law; nor shall this section prevent any abstract company chartered under the laws of the State of Mississippi with a paid up capital of fifty thousand dollars ($50,000.00) or more from making or certifying to abstracts of title to real estate through the president, secretary or other principal officer of such company.

Id.

a mediation conference, attend a mediation conference with or without the client's attendance or the attendance of an attorney on behalf of the client, negotiate with the opposing party, and even execute a settlement agreement on behalf of the client. However, a public adjuster may not give any counsel or advice to a client; appear as an advocate in a representative capacity in a court of law; or draw papers, pleadings, or documents in connection with a pending or prospective proceeding before any court of record in Mississippi because these activities are prohibited by Section 73-3-55 of the Mississippi Code.

If a public adjuster begins to offer more than technical advice to an insured about the amount of damage sustained, the cost to replace the damaged property, and perhaps how the repairs should be done, the work of the public adjuster begins to resemble the practice of law, a domain reserved exclusively for lawyers in all states. When public adjusters begin to advise clients regarding their rights such as the terms and limitations of insurance policies, the coverages that are applicable in a given situation, or the liabilities pertaining to issues of law, concerns arise that public adjusters are not simply experts who are hired to assist the insured but rather experts who are engaged in the practice of law. Moreover, when public adjusters obtain powers of attorney from clients, send letters of representation to insurance companies explaining that they represent the clients in the insurance disputes, counsel clients on the effect of release agreements, and give advice affecting legal rights, the argument that public adjusters are engaged in the unauthorized practice of law becomes stronger.

To prevent any allegations that they are engaged in the unauthorized practice of law, perhaps it is best that public adjusters limit their activities to gathering details of the claim such as inspecting the loss site, analyzing the damages, assembling the claim support data, reviewing the insured's coverage, determining current replacement costs, and negotiating for or effecting settlements on behalf of insureds. Any activities beyond these limited matters will allow the public adjuster to run afoul of Section 73-3-55 of the Mississippi Code.

VI. Conclusion

As a result of the 2007 changes to Mississippi law, Mississippi now has new laws pertaining to insurance adjusting on behalf of public adjusters. Consequently, Mississippi has in place guidelines that will assist public adjusters, claims adjusters, independent adjusters, and members of the public in determining the limits and boundaries of the activities of public adjusters in the State of Mississippi.

FEDERAL INSURANCE REFORM AFTER KATRINA

*United States Representative Gene Taylor**

Hurricane Katrina exposed an urgent need for Congress to reform the insurance industry in order to protect property owners and taxpayers after natural disasters.

After Katrina, several insurance companies exploited the weak government oversight of insurance practices to defraud property owners and taxpayers. Companies manipulated insurance adjustments to blame flooding for many losses that should have been covered by the insurers' own windstorm policies.

These practices helped insurers deny thousands of policyholders the coverage for which they had paid high premiums, allowed insurers to shift liability for some wind damage to the National Flood Insurance Program, and saddled federal taxpayers with billions of dollars of repair and rebuilding costs that should have been paid by insurance.

Tens of thousands of homes, businesses, schools, churches, and other buildings near the Mississippi Gulf Coast were destroyed or damaged by the combination of wind and flooding. The Commander Naval Oceanography and Meteorology Command (CNMOC) at the Stennis Space Center has established

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* United States Representative Gene Taylor represents the Fourth District of Mississippi. He serves on both the House Armed Services Committee and the House Transportation and Infrastructure Committee. In addition, Representative Taylor serves as co-chair of the Shipbuilding Caucus, National Guard and Reserve Caucus, Coast Guard Caucus, and Expeditionary Warfare Caucus. He is also a member of the Conservative Democrats' Blue Dog Coalition.

that coastal Mississippi suffered four hours of hurricane force winds before the storm surge.[1] Unfortunately, in many cases, there was not enough physical evidence remaining to determine how much damage had been caused by wind before the surge.

Inland, where there was no flooding, insurance companies paid hundreds of thousands of wind damage claims totaling billions of dollars. Insurance companies paid Katrina wind claims in every county in Mississippi, every parish in Louisiana, most of Alabama, Northwest Florida, and even into Tennessee and Georgia. Yet, on the Mississippi Gulf Coast where winds were strongest, thousands of homeowners were left with uncovered losses because these companies denied their claims for wind damage.

Because it was difficult to prove how much damage was caused by wind and how much was caused by flooding, the central legal question regarding wind/water disputes is which party has the burden to prove the cause of damage. Does the insurance company have to prove how much damage was caused by flooding in order to exclude wind coverage, or does the policyholder have to prove how much damage was caused by wind in order to collect on a wind policy?

State Farm, Allstate, Nationwide, USAA, and several other major insurers took the position that they would only pay for wind damage that was separate from any flooding.[2] Any damage that they deemed to have been caused by the combination of wind and flooding was to be excluded from their wind coverage.

Less than one week after Katrina, Nationwide issued a document instructing its adjusters that "if loss is caused by both flood and wind there is no coverage."[3]

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[1] COMMANDER NAVAL METEOROLOGY AND OCEANOGRAPHY COMMAND, PRELIMINARY MODEL HINDCAST OF HURRICANE KATRINA STORM SURGE (Nov. 21, 2005), *available at* http://kern.org/pdf/NRL-Stennis-Katrina.pdf.

[2] *See, e.g.*, Memorandum from Prop. and Cas. Claim Consulting Servs. to State Farm Claim Assocs. Handling CAT PL in the Cent. and S. Zones (Sept. 13, 2005), *available at* http://www.house.gov/genetaylor/SFprotocal.pdf.; Buete v. Allstate Ins. Co., 422 F.Supp. 2d 690 (S.D. Miss. 2006) (mem.) (noting Allstate's position); NATIONWIDE, WIND VERSUS FLOOD Q & A'S FOR ALABAMA AND MISSISSIPPI 2 (Sept. 4, 2005), *available at* http://www.house.gov/genetaylor/NationwideQA.pdf.

[3] NATIONWIDE, WIND VERSUS FLOOD Q & A'S FOR ALABAMA AND MISSISSIPPI 2 (Sept.

Two weeks after Katrina, State Farm issued a memorandum that instructed its adjusters that "[w]here wind acts concurrently with flooding to cause damage to the insured property, coverage for the loss exists only under flood coverage, if available."[4]

State Farm took the most extreme position among the insurance companies in Mississippi, and insisted that the Anti-Concurrent Causation language in its policies excluded coverage of all wind damage wherever flooding contributed to the loss, regardless of the sequence of wind and flood damage. Thus, under State Farm's interpretation, wind damage that would have been covered could suddenly become excluded if flooding occurred several hours later.

One week after Katrina, Mississippi Commissioner of Insurance George Dale issued a bulletin advising insurance companies that they had to prove that a loss was caused by flooding in order to deny wind coverage.[5] State Farm and other companies ignored the bulletin and the Department of Insurance did little to enforce it.

Seven months after Katrina, Commissioner Dale wrote to State Farm reiterating that the company had the burden of proof and further advising that the Anti-Concurrent Causation Provision in State Farm's policies did not eliminate the company's obligation to prove the cause of loss and to apportion damage between wind and flooding.[6]

State Farm replied with a letter stating that it would pay for wind damage that it could prove occurred before the surge flooding.[7] This position still shifted the burden of proof in the

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4, 2005), *available at* http://www.house.gov/genetaylor/NationwideQA.pdf.

[4] Memorandum from Prop. and Cas. Claim Consulting Servs. to State Farm Claim Assocs. Handling CAT PL in the Cent. and S. Zones (Sept. 13, 2005), *available at* http://www.house.gov/genetaylor/SFprotocal.pdf.

[5] MISS. DEP'T OF INS., BULL. NO. 2005-6 (Sept. 7, 2005).

[6] Letter from George Dale, Comm'r of Ins., Miss. Dep't of Ins., to Allen McGlynn, State Farm Fire and Cas. Co. (Mar. 24, 2006), *available at* http://www.house.gov/genetaylor/DaleLettertoSF.pdf.

[7] Letter from James Burwell, Claims Manager, State Farm Fire and Cas. Co., to Lee Harrell, Deputy Comm'r of Ins., Miss. Dep't of Ins. (Mar. 31, 2006), *available at* http://www.house.gov/genetaylor/DaleLettertoSF.pdf.

company's favor. Instead of proving how much damage had been caused by flooding in order to deny wind claims, State Farm paid only where it could prove that flooding was not the cause. That position claims all of the benefit of the doubt in State Farm's favor, rather than in the policyholder's favor.

The insurance companies' efforts to shift the burden of proof to policyholders were aided by the National Flood Insurance Program (NFIP). The federal government contracts with insurance companies to sell flood insurance policies that are backed by federal taxpayers. The insurance companies also adjust the flood claims.

Where wind and flooding both have caused damage, an insurance company has a conflict of interest when adjusting both the federal flood claim and its own wind claim. The federal government allows a single adjuster to handle both claims, but the regulation specifies that the company has a fiduciary responsibility to represent federal taxpayers and to provide a proper adjustment of combined wind and water losses.[8]

After Katrina, with so much property destroyed by the combination of wind and flooding, the federal administrators of NFIP should have provided for diligent oversight of the adjustment process to protect the interests of policyholders and taxpayers. Instead, the Director of NFIP issued a policy memorandum that authorized companies to use expedited procedures in areas that FEMA determined had been inundated by storm surge or flooding after levee failures.[9] Under these expedited procedures, companies were authorized to pay the policy limits of the flood policy without a detailed assessment and in some cases without even visiting the site.[10]

NFIP implemented the expedited claims procedure at the insistence of insurance companies that had initiated the concept and drafted the procedures.[11] The policy allowed companies to

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[8] 44 C.F.R. § 62.23(f) (2005).

[9] Memorandum from David I. Maurstad, Acting Dir., Mitigation Div., FEMA, to Write Your Own Principal Coordinators and the NFIP Servicing Agent (Sept. 21, 2005) (on file with author).

[10] *Id.*

[11] Rebecca Mowbray, *Memo Called 'Blank Check,'* TIMES PICAYUNE, June 15, 2007,

hand out flood insurance checks from federal taxpayers without proving how much damage had been caused by flooding, without apportioning the amount of wind and flood damage to structures with losses from both perils, and without considering whether some buildings may have been destroyed by wind and wind-driven debris before any flooding occurred.

With neither the Mississippi Department of Insurance nor FEMA requiring insurance companies to prove how much damage was caused by flooding, State Farm and other companies were free to deny and delay claims for wind losses. Meanwhile, companies conspired with adjusting and engineering firms to rig damage assessments.

Internal e-mails between the engineers of Forensic Analysis and Engineering Corporation (FAEC), a State Farm contractor, reveal that State Farm demanded that FAEC not estimate how much damage was caused by wind and how much was caused by flooding, but instead simply determine the "predominant" cause of the damage.[12] After FAEC engineers concluded that wind had been the predominant cause of damage to a few houses, State Farm threatened to fire FAEC and agreed to retain the company only after FAEC agreed to rewrite the reports that had blamed the loss on wind.[13]

At Rimkus Consulting Group, an engineering firm that worked for State Farm, Allstate, and a few other insurance companies, on-site damage assessments that concluded wind was responsible for some of the damage were rewritten by engineers and office managers who had never visited the sites.[14] Several engineers who conducted on-site assessments for Rimkus stated that the company revised their reports to blame all damage on flooding without their knowledge, consent, or consultation.[15]

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at A-1.

[12] E-mail from Randy Down to Adam Sammis (Oct. 13, 2005, 11:32 CST) (on file with author).

[13] *See* Transcripts of Selected Internal E-mails, Forensic Analysis and Engineering Corp. (Oct. 2005), *available at* http://www.house.gov/genetaylor/FAECemails.pdf.

[14] Anita Lee, *Engineer: Reports Altered, Name Forged,* SUN HERALD, Apr. 11, 2006, at A1. For examples of altered engineering reports, see http://www.house.gov/genetaylor/OIHearing.Docs.htm.

[15] *Id.*

The *Times Picayune* reported several cases in which insurance companies shifted wind damages to the flood insurance program, including cases involving allegations that NFIP was billed for extensive repairs to homes with no flooding or minimal flooding,[16] cases in which adjusters used much higher estimates for building costs when figuring the amount of the flood claim than when estimating the wind payment for the same house,[17] and a case in which adjusters attached a list of upstairs contents to the flood claim for ground floor flooding instead of to the wind claim for upstairs damage.[18]

In the aftermath of Hurricane Katrina, the insurance industry has proven beyond any doubt that the private insurance market is not capable of offering adequate coverage in coastal communities. The insurance and reinsurance industries have a well-developed pattern of exploiting the market conditions after a major catastrophe to simultaneously reduce the risk while hiking up their premiums. The market manipulation and profiteering after Katrina surpassed all previous "hard markets" in the insurance sector.

Insurance companies have blamed Katrina as they have stopped writing new policies and doubled, tripled, or quadrupled premiums on existing policies. They have not confined this price gouging to Mississippi and Louisiana, but have jacked up premiums and reduced coastal risk from the Texas Coast to Long Island and Cape Cod.

Almost every private insurance company has stopped offering new windstorm coverage on the Mississippi Gulf Coast, and some companies cancelled existing policies when they came up for renewal. As a result, more and more property owners have no alternative other than the Mississippi Windstorm Underwriting Association, commonly referred to as the Wind Pool, the state's insurer of last resort.

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[16] Rebecca Mowbray, *Insurers bilked flood program, suit says*, TIMES PICAYUNE, May 31, 2007, at A-1.

[17] Rebecca Mowbray, *Same house. Same repairs. Same insurer. Why different prices?* TIMES PICAYUNE, May 20, 2007, at A-1.

[18] Rebecca Mowbray, *Inflated flood claim turns up at trial*, TIMES PICAYUNE, May 20, 2007, at A-13.

The Wind Pool has had to buy more reinsurance coverage on the global market at exorbitant prices. These reinsurance costs forced the Wind Pool to seek a 398% premium increase on residential policies and 268% on commercial policies. Fortunately, the federal government has allowed the state to use eighty million dollars in federal Katrina assistance to subsidize the Wind Pool for two years.[19] This temporary federal subsidy does not alter the long-term dilemma facing the Wind Pool and the Mississippi Gulf Coast.

Other coastal states also are suffering almost as badly as Mississippi and Louisiana. Insurance companies have dumped half of the policies in Texas coastal counties into the Texas Wind Pool, which is projected to have sixty billion dollars in risk by the end of 2007.[20] Insurers have dumped almost fifty billion dollars in coastal liability into North Carolina's wind pool. Forty percent of the policies on Cape Cod have been forced into the Massachusetts FAIR plan, that state's insurer of last resort.[21] Every county and parish on the Gulf and Atlantic Coasts is undergoing similar insurance market failures.

Congress needs to address this insurance crisis now, before the next disaster.

I am a lead cosponsor of H.R. 1081,[22] legislation to repeal the McCarran-Ferguson Act, which exempts the business of insurance from federal anti-trust laws. No one should be above the law. Katrina proved that states are not capable of protecting consumers and taxpayers from unfair business practices by global insurance and reinsurance companies.

When insurance companies say they must cancel policies in New York because global reinsurance premiums tripled as a result of a hurricane in Mississippi, it should be clear that regulation of the insurance industry is far beyond the reach of individ-

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[19] MISS. DEV. AUTH., RATEPAYER AND WINDPOOL MITIGATION PROGRAM RECOVERY ACTION PLAN, AMENDMENT 3–MODIFICATION 1 (Feb. 12, 2007).

[20] Ryan Myers, *Last resort windstorm policies soar in SE Texas,* BEAUMONT ENTERPRISE, Sept. 2, 2007.

[21] Sarah Shemkus, *Cape residents vent insurance ire,* CAPE COD TIMES, Sept. 8, 2007.

[22] Insurance Industry Competition Act, H.R. 1081, 110th Cong. (2007).

ual states.

My priority insurance reform proposal, the Multiple Peril Insurance Act, has been approved by the House of Representatives as part of H.R. 3121, the Flood Insurance Reform and Modernization Act.[23] I am now working with Senator Thad Cochran of Mississippi, and other supporters, including Senator Chuck Schumer of New York, Senator Mel Martinez of Florida, and Senator Mary Landrieu of Louisiana to build Senate support.

The Multiple Peril Insurance Act, which I introduced in February 2007 as H.R. 920,[24] would create an option in the National Flood Insurance Program to offer both wind and flood coverage in a single policy. This would allow coastal residents to buy insurance and know that their hurricane damage would be covered without needing to hire lawyers, engineers, and public adjusters to try to distinguish the wind damage from the flood damage. The bill would require the premiums for the new coverage to be risk-based and actuarially sound so that the program would pay for itself.

This bill is not asking inland taxpayers to subsidize coastal property owners. On the contrary, it is asking that coastal property owners be able to pay premiums for more comprehensive insurance coverage so that taxpayers do not have to provide FEMA trailers, subsidized loans, homeowner repair grants, and special tax deductions after future disasters. Taxpayers everywhere will benefit when more hurricane damage is covered by insurance premiums rather than by inefficient disaster assistance programs.

The Multiple Peril Insurance Act also will stabilize the insurance markets in coastal areas where insurance companies have stopped writing new policies. Insurance companies could return to coastal markets to sell homeowners' insurance covering fire, theft, and liability risks without taking on the hurricane risk that they are avoiding. The agents would receive a commission for selling the federal multiple peril policy and the company

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[23] H.R. 3121, 110th Cong. (2007).

[24] Multiple Peril Insurance Act, H.R. 920, 110th Cong. (2007).

would be reimbursed for reasonable administrative expenses.

In a recent report that detailed the volatility of the windstorm insurance market in Gulf states, economist Lloyd Dixon, of the RAND Corporation, explained the benefit of a federal insurance pool to cover hurricanes and other major disasters:

> Government is also not subject to the private-sector factors that produce large swings in premiums around expected loss in private insurance markets. Thus, compared with the private sector, government should be able to set insurance prices closer to expected loss for hurricanes and other catastrophic risks, and keep those prices closer to expected loss over time.[25]

Of course, a federal wind and flood program also would spread the hurricane risk geographically. This would make it much more stable than the current system where each coastal state has its own high-risk pool. Insurance works best when the insured pool can spread the risk. A federal pool spread over all coastal states would not have a high percentage of its properties hit at one time. On the other hand, a single state pool with concentrated risk could have losses to most of its properties after a major hurricane.

The Multiple Peril Insurance Act would offer residential coverage up to $500,000 for the structure and $150,000 for the combination of contents and additional living expenses. The bill would offer one million dollars coverage for a nonresidential structure and $750,000 for the combination of contents and business interruption coverage. These coverage limits should be sufficient to cover most coastal properties. A private insurance market should develop to offer the excess coverage for those homes and businesses that need additional coverage above the federal program's policy limits.

The new wind coverage would be available only in combination with flood coverage, and would only be available in communities that have adopted building codes that are consistent with the windstorm standards of the International Building Codes.

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[25] LLOYD DIXON, JAMES W. MACDONALD & JULIE ZISSIMOPOLOUS, COMMERCIAL WIND INSURANCE IN THE GULF STATES: DEVELOPMENTS SINCE HURRICANE KATRINA AND CHALLENGES MOVING FORWARD 3 (2007).

The program would set premiums according to risk by using the same data available to insurance companies and state wind pools. Once the risk is estimated for a location, the premiums for specific properties would be set by adjusting for construction methods, foundation, wall, and roof types, and other building characteristics.

During House consideration of H.R. 3121,[26] I offered an amendment to prohibit insurance companies that participate in the NFIP from using Anti-Concurrent Causation provisions in their own policies to exclude coverage of wind damage simply because flooding also contributed to the damage. This would protect the homeowners who continue to have separate wind and flood policies. My amendment was approved by voice vote without opposition.

The Multiple Peril Insurance Act would not have made it through the House of Representatives without the strong leadership of Speaker of the House Nancy Pelosi. The Speaker has visited the Mississippi Coast three times since Katrina and on two of those occasions she allowed me to arrange town meetings on insurance issues for the visiting Congressional Delegations. Before the Financial Services Committee vote on the bill, the Speaker personally urged the Democrats on the Committee to support it.

The Multiple Peril Insurance Act also received strong support from House Financial Services Committee Chairman Barney Frank, Housing Subcommittee Chairman Maxine Waters, and Oversight and Investigations Subcommittee Chairman Mel Watt. Representative Maxine Waters held three hearings on the insurance concerns addressed by this bill. Representative Mel Watt held two hearings on the handling of Katrina insurance claims. Chairman Frank merged H.R. 920,[27] with his flood insurance reform bill, H.R. 1682,[28] to create H.R. 3121,[29] and managed the bill through the Committee and on the House floor.

The legislation passed the House by a vote of 263-146, with

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[26] H.R. 3121, 110th Cong. (2007).

[27] Multiple Peril Insurance Act, H.R. 920, 110th Cong. (2007).

[28] H.R. 1682, 110th Cong. (2007).

[29] Flood Insurance Reform and Modernization Act, H.R. 3121, 110th Cong. (2007).

the support of 218 Democrats and 45 Republicans. From the beginning, the multiple peril bill had broad Democratic support and the support of Republicans from coastal districts, including Representative Bobby Jindal of Louisiana, Representative Walter Jones of North Carolina, Representative Jo Bonner of Alabama, and Representative Jeff Miller of Florida.

Governor Haley Barbour and Senator Trent Lott submitted letters of support for the Multiple Peril Insurance Act to the House Financial Services Committee before the committee acted on the bill. The new optional wind coverage received an important boost when it was endorsed by the National Association of Home Builders in early September. The National Association of Realtors and the American Banking Association also urged Members of Congress to support H.R. 3121.

REVAMPING THE WIND POOL

Ronald G. Peresich[*]

In 1987, in the aftermath of significant hurricane damage to the Mississippi Gulf Coast, many of the major property and casualty insurance companies discontinued writing home and commercial coverage in the six coastal counties.[1] To address the problem, the Mississippi Legislature created the Mississippi Windstorm Underwriting Association (MUWA).[2] The MWUA was created as an arm of the Insurance Commissioner's office and came to be commonly referred to as the "wind pool."

The wind pool was designed to be an insurer of last resort. The coast county residents who were unable to find private insurance through the usual markets were given the opportunity to have their properties insured through companies who were mandated to be members of the wind pool. The rates for coverage in the wind pool were slightly higher than those in the private market since its purpose was to have coverage written through the wind pool only as a last resort.

All insurance companies admitted in Mississippi that wrote standard, first line property policies anywhere in the state were mandated to be members of the wind pool. Even if an insurer only wrote property policies in a single county, it must still be a member of the wind pool. At the time of Hurricane Katrina,

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[1] The six coastal counties include Harrison, Hancock, Jackson, George, Stone and Pearl River Counties.

[2] MISS. CODE ANN. §§ 83-34-1 to -39 (2007).

there were 16,000 outstanding policies written through the wind pool. Today, the wind pool has issued in excess of 30,000 policies. The sharp increase is a result of fewer companies writing standard wind policies in the six southern counties, forcing these now "uninsurable" policy holders into the wind pool.

The wind pool buys as much reinsurance as it can afford with annual premium incomes to help cover losses. In years when premium income and available reinsurance are not sufficient to pay all claims, wind pool losses are assessed to member companies based on a percentage of each company's statewide market share. Certain credits are given to companies writing standard policies in the six southern counties. Under prior law and regulations, if the wind pool had more premium income than losses at the end of the year, the surplus was distributed to member companies on their prorata assessment basis. Premium rates have been suppressed over the last twenty years, meaning they were not actually sound, but fluctuations of profits or losses were not significant until Katrina.

The catastrophic and unanticipated massive claims that grew out of Katrina created the need to rethink and revamp the wind pool. Before Katrina, the wind pool had $1.8 billion of total insured value (TIV). Approximately $800 million was paid out in claims,[3] which is forty-four percent of the TIV. Today, it is estimated that the wind pool's TIV is approximately six billion dollars. In the event of another Katrina, forty-four percent in paid claims would equal $2.6 billion. One year after Katrina, it became apparent that the problem was only going to get worse. More and more people were forced into the wind pool because companies were not writing standard policies in the six coastal counties.

The losses to the wind pool as a result of Katrina were $545 million. These losses were made up by the assessments to the member insurance companies. In addition to having to cover this large amount of losses, the wind pool had another major

[3] Although most claims have been settled, there are still a few outstanding.

problem—rising reinsurance premiums. The reinsurance market tightened up following Katrina, and the cost to member companies and the wind pool itself to buy reinsurance went up dramatically. At the time of Katrina the pool carried $175 million in reinsurance and it was generally agreed that post-Katrina it needed at least $350 million of reinsurance. The premiums for such reinsurance could cost the wind pool $60 million or more.

The need for new legislation was critical. The effort to reform the MWUA legislation began in the summer of 2006, made necessary by the $545 million in losses growing out of Hurricane Katrina, when Mississippi Insurance Commissioner George Dale announced rate increases of 90% on homeowners and 268% on commercial businesses written in the southern six counties.[4] At the same time the rate increases for wind pool policy holders were announced, insurance coverage written outside of the pool on homes and businesses statewide was also seeing rate increases, which permitted the wind pool members to recover their wind pool losses. Premiums were rising at rapid rates and certain types of coverages were no longer available statewide. It was (and is) a statewide problem.

Recovery efforts on the Gulf Coast began to stagnate because of the lack of available and affordable insurance. Many homeowners, small business owners, condominium developers, and potential unit owners were finding it impossible to find affordable coverage, and without coverage, were unable to borrow money to buy, build and repair. The problem was further exacerbated by the fact that a number of these homeowners were also small business owners who were being hit with rate increases at home and at work.

During the summer of 2006, the insurance situation had become a crisis. The newly formed Gulf Coast Business Council (the Council)[5] made insurance its top priority and began to formulate plans. Its legislative committee met with a number of

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[4] *See supra* note 2.

[5] The Council is a civic organization comprised of top business leaders whose mission is to seek long term solutions on regional issues.

insurance agents, bankers, and homeowners to get a grip on the scope of the problem.

Through various surveys, the Council learned that as late as ten months post-Katrina, over five thousand people continued living in shacks and unventilated homes, and approximately seventy thousand people were living in thirty thousand FEMA trailers. The human toll was mounting.

In early August of 2006, Council members met with the Mississippi Senate and House Insurance Committees and came up with a plan which included a number of elements:

1. A request to the federal government for permission to use $30 million of grant money for a direct infusion into the wind pool to achieve a rate reduction.

2. A revamping of the wind pool and call for a new wind pool plan.

3. A mechanism to require that non-admitted companies (surplus lines) be required to participate in the wind pool by paying a fee to the pool.

4. A diversion of monies from sales tax and/or increases in premium taxes into a reinsurance fund.

5. And most importantly, a provision for the recoupment of losses caused by future disasters through the issuance of corporate bonds (not state obligation bonds) which would in turn be paid for by minimal rate increases on policies written statewide.

In advance of the legislative session, the Council began working with coastal legislators, laying out its plan, receiving their suggestions, and preparing for what was thought might be a contentious session. At the time, there were media stories of people who were not from the coast quoted as saying that the insurance crisis was a Gulf Coast problem and that there was no reason for other areas of the state to help pay the "freight." The Council went to work early in the session to convince legislators that this was indeed a statewide problem that could only be solved on a statewide basis. In addition, a significant amount of

economic information was prepared which showed that the state would lose hundreds of millions of dollars if the insurance situation was not settled soon so that recovery could commence in earnest.

As the session began, the Council's proposed bill was filed. It was entitled "The Mississippi Economic Growth and Redevelopment Act of 2007,"[6] and was designed to stimulate economic growth and redevelopment in all areas of the State by promoting the availability of affordable commercial and residential insurance coverage.

Although the bill was revised and amended several times through the committee process—all for the better—in the end, its essential features remained. The final Act passed the House and the Senate by unanimous votes, which is unheard of for bills containing as much substance as this one. If these unanimous votes did not set a record, they at least tied one.

The Act contains twenty-four sections. The major features of each section are as follows:

> *Section 1*: Names the Act the "Mississippi Economic Growth and Redevelopment Act of 2007."
>
> *Section 2*: Creates a special fund in the State Treasury (Mississippi Windstorm Underwriting Association Reinsurance Assistance Fund) and provides that monies in the special fund may be used by the Department of Insurance, upon appropriation by the Legislature, for the purpose of assisting the wind pool in defraying expenses for reinsurance; provides that any monies in excess of $50 million remaining in the special fund at the end of a fiscal year that have not been appropriated will lapse into the State General Fund; and requires the Commissioner of Insurance to file a report with the Joint Legislative Budget Committee no later than September 1 of each year, recommending the amount of assistance, if any, needed by the wind pool for reinsurance expenses and

[6] 2007 Miss. Laws ch. 425.

recommending the amount necessary to be appropriated to the fund.

Section 3: Requires the State Tax Commission, beginning with fiscal year 2007 through fiscal year 2010, to annually deposit from insurance premium tax revenue the amount of twenty million dollars for each fiscal year into the Mississippi Windstorm Underwriting Association Reinsurance Assistance Fund. Each billing statement for property insurance written by the Wind Pool must clearly indicate that by act of the Legislature $20 million is deposited annually for four years into the Mississippi Windstorm Underwriting Association Reinsurance Assistance Fund. This section is repealed effective July 1, 2010.

Section 4: Provides an annual credit against state insurance premium taxes for domestic and foreign insurance companies for new wind and hail policies written in the coastal area of the state. The maximum amount of the credit is $100,000 per calendar year.

Section 5: Amends Section 83-34-1 of the Mississippi Code to define the term "net direct premiums" and other certain terms.

Section 6: Amends Section 83-34-3 of the Mississippi Code to revise the organizational structure of the MWUA. Former members of the MWUA shall be "assessable insurers" and shall have no rights to the assets and profits of the MWUA.

Section 7: Creates Section 83-34-4 of the Mississippi Code, and requires all agents placing insurance through nonadmitted insurers to collect and remit to the MWUA a nonadmitted policy fee. In addition to the nonadmitted policy fee, agents placing insurance through nonadmitted insurers shall collect and remit surcharges as provided in the act.

Section 8: Amends Section 83-34-5 of the Mississippi Code to revise the powers of the MWUA.

Section 9: Amends Section 83-34-7 of the Mississippi Code to revise the membership of the MWUA Board of Directors. The new membership consists of:

- the State Treasurer;
- five representatives of assessable insurer companies: three appointed by the Commissioner of Insurance, one appointed by the Governor, and one appointed by the Lieutenant Governor;
- three agents with at least ten years' experience in the property and casualty industry, two of whom are residents in the coast area and one of whom is not a resident of the coast area: one such coast area agent appointed by the Governor, one such coast area agent appointed by the Lieutenant Governor, and the noncoast area agent appointed by the Commissioner of Insurance;
- two business leaders who have been residents of the coast area for at least ten years and who have at least ten years' experience in management of a business: one appointed by the Governor and one appointed by the Lieutenant Governor.

Section 10: Amends Section 83-34-9 of the Mississippi Code to provide that all assessable insurers shall participate in regular assessments, to require all profits of the association to remain as assets of the MUWA, and to require financial incentives or penalties to ensure assessable insurers write insurance in the coast area.

Section 11: Creates Section 83-34-10 of the Mississippi Code to authorize the MUWA, with consent of the Commissioner of Insurance, to levy regular assessments

against assessable insurers in the event of a storm that may produce losses in excess of funds immediately available to the MUWA, or in the event that the association otherwise determines it will have a claim deficit or other deficit. In any year, the annual total of regular assessments shall not exceed the greater of ten percent of the deficit or ten percent of the aggregate statewide direct written premiums for property insurance for the prior calendar year of all assessable insurers.

Section 12: Amends Section 83-34-11 of the Mississippi Code to direct the Commissioner of Insurance to implement a surcharge on all property and casualty premiums statewide in order to recoup within one year regular assessments and reimburse assessable insurers. Excluded are premiums for workers' compensation coverage, premiums for medical malpractice liability coverage including medical malpractice liability coverage issued by companies created as nonprofit medical liability insurance corporations,[7] and any premiums for coverage by insurance pools or plans administered by or through the State of Mississippi. The recoupment to assessable insurers must be refunded to the MUWA by any insurer that reduces its property writings in the state by more than ten percent in the five-year period following the assessment.

Section 13: Creates Section 83-34-12 of the Mississippi Code to provide for deferral of a regular assessment by order of the Commissioner of Insurance if the Commissioner determines that payment of the assessment would render the insurer insolvent or in danger of insolvency, or would otherwise leave the insurer in such a condition that further transaction of the insurer's business would be hazardous to its

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[7] *See* MISS. CODE ANN. §§ 83-47-1 to -25 (2007).

policyholders, creditors, assessable insurers, subscribers, stockholders or the public.

Section 14: Amends Section 83-34-13 of the Mississippi Code to revise the required contents of the MUWA's plan of operation. The plan of operation shall provide financial incentives or financial penalties, or both, to ensure that assessable insurers write essential property insurance in the coast area.

Section 15: Amends Section 83-34-15 of the Mississippi Code to revise the process for application for coverage.

Section 16: Amends Section 83-34-17 of the Mississippi Code to conform with other provisions.

Section 17: Amends Section 83-34-19 of the Mississippi Code to revise the process for appeal of decisions made by the MUWA or the Commissioner of Insurance.

Section 18: Amends Section 83-34-21 of the Mississippi Code to conform with other provisions.

Section 19: Amends Section 83-34-23 of the Mississippi Code to provide immunity from liability for the Commissioner of Insurance, the MUWA, its agents, representatives and employees, the members of the board, or any assessable insurer of the MUWA, except for the contractual obligations of any contract of insurance and the duty to pay assessments.

Section 20: Amends Section 83-34-27 of the Mississippi Code to authorize the examination of data and payments of assessable insurers and agents placing insurance through nonadmitted insurers.

Section 21: Creates Section 83-34-31 of the Mississippi Code to authorize the MUWA to issue bonds and enter into loans. The bonds and loans are secured by the power

and duty of the Commissioner of Insurance to implement surcharges sufficient to repay the bonds or loans.

Section 22: Creates Section 83-34-33 of the Mississippi Code to authorize the Commissioner of Insurance to implement, upon request by the MUWA, a surcharge for excess hurricane losses on all property and casualty premiums statewide to recover the amount of bonds or other indebtedness of the MUWA. Excluded are premiums for workers' compensation coverage, premiums for medical malpractice liability coverage including medical malpractice liability coverage issued by companies created as nonprofit medical liability insurance corporations,[8] and any premiums for coverage by insurance pools or plans administered by or through the State of Mississippi.

Section 23: Creates Section 83-34-35 of the Mississippi Code to direct the Commissioner of Insurance to approve MUWA rates that are at least adequate to fund annual reinsurance above a certain reserve.

Section 24: Effective after its passage.

CONCLUSION

In many respects, as Mississippians came together on this legislation, it can justifiably be looked back upon as one of our finest hours. It represented a true statewide public and private partnership between the citizens and our governmental leadership to confront a critical situation head-on. We put aside partisanship[9] and boundary lines and announced to the rest of the country, once again, that Mississippi is willing and able to take care of her own problems. We should all be proud.

The bill that passed was House Bill 1500. Because of the extreme circumstances, the Legislature provided that the Act

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[8] *See* MISS. CODE ANN. §§ 83-47-1 to -25 (2007).

[9] The bill was supported by the Governor, the Lieutenant Governor, and the Speaker of the House.

would be effective after passage, rather than waiting until the usual July 1 effective date. At the signing ceremony, Governor Barbour, and others in leadership positions in the Mississippi Legislature, proudly announced that this was the first major step in solving the insurance crisis that has existed in Mississippi since Hurricane Katrina.

THE GO ZONE ACT: AN INNOVATIVE MECHANISM FOR PROMOTING ECONOMIC RECOVERY FOR THE GULF COAST

*Kimberly E. Smith**

I. INTRODUCTION

The 2005 Atlantic hurricane season generated a record number of tropical storms and hurricanes, contributing to over $128 billion in damages and over 2,200 casualties.[1] Most notably, residents and businesses all along the Gulf Coast from Texas to Florida were significantly impacted by Hurricanes Katrina, Rita, and Wilma. Countless residential and commercial properties within the coastal area were significantly damaged or destroyed by these storms.[2] In order to stimulate economic growth and development in the areas along the Gulf Coast, Congress passed the Gulf Opportunity Zone Act of 2005 (the GO Zone Act).[3] The GO Zone Act, signed into law by

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[1] NOAA Satellite and Information Service, 2005 Annual Climate Review U.S. Summary, http://www.ncdc.noaa.gov/oa/climate/research/2005/ann/us-summary.html (last visited Nov. 13, 2007).

[2] "As a result of these three storms, approximately three million claims were filed against insurance companies, and approximately 10% of the claims ended up in litigation or mediation." Raymond L. Placid, *Handling Costs Incurred in Litigating Casualty Loss Claims*, 78 PRAC. TAX STRATEGIES 77 (Feb. 2007).

[3] Gulf Zone Opportunity Act of 2005, Pub. L. No. 109-35, 119 Stat. 2577 (2005).

President Bush on December 21, 2005, contains significant economic incentives to rebuild the areas affected by the hurricanes, as well as attract new investments to these affected areas. This article will discuss the policy and history of the GO Zone Act and summarize the most notable provisions of the GO Zone Act. This article will also discuss the requirements and procedure for bonus deprecation and tax-exempt financing, and explain how certain state and local incentives might also be applicable to businesses located in the GO Zone.

II. THE 2005 HURRICANE SEASON

Hurricane Katrina made landfall on August 29, 2005. It was the costliest and one of the deadliest storms in the history of the United States, with over eighty-one billion dollars in damage and approximately 1,830 casualties attributable to the storm.[4] Congress first responded to the catastrophic damage and destruction caused by Hurricane Katrina by passage of the Katrina Emergency Tax Relief Act of 2005 (the Katrina Act), which was signed into law on September 23, 2005.[5] The Katrina Act was created to provide emergency relief to individuals affected by Hurricane Katrina and included provisions for casualty losses,[6] early withdrawal from retirement plans,[7] and

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[4] RICHARD D. KNABB, JAMIE R. RHOME & DANIEL P. BROWN, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT HURRICANE KATRINA 23-30 AUGUST 2005 (2005). Hurricane Katrina formed on August 23, 2005, from a tropical wave and became a depression about 175 miles south of Nassau in the Bahamas. *Id.* at 1. On August 25, it became a Category 1 storm and made landfall on the Miami-Dade-Broward County line in south Florida. *Id.* at 2. On August 28, 2005, after Katrina crossed south Florida and entered the Gulf of Mexico, it reached Category 5 and fell to the fourth lowest pressure on record. *Id.* at 6. On the morning of August 29, 2005, Hurricane Katrina made landfall as a Category 3 storm. *Id.* at 6-7. Later that day, still as a Category 3 storm, it made a second landfall near the Louisiana-Mississippi border. *Id.* at 7.

[5] Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016 (2005).

[6] I.R.C. § 1400S(b) (2008). An individual's Katrina-related casualty losses are deductible without regard to the $100-per-casualty and 10%-of-adjusted-gross-income floors.

[7] I.R.C. § 1400Q. Eligible individuals may withdraw up to $100,000 of distributions from IRAs and qualified plans without paying the ten percent penalty tax for pre-age-591/2 withdrawals. I.R.C. § 1400Q(a). Eligible individuals are those who lived in a Katrina disaster area and make the distribution within one year after the area was

employment relief.[8]

Less than a month after Hurricane Katrina made landfall, and one day after the Katrina Act was signed into law, Hurricane Rita made landfall on the Texas–Louisiana border as a Category 3 storm on September 24, 2005.[9] Hurricane Rita was the seventeenth named storm of the 2005 season and resulted in approximately $11.68 billion in damages and 120 direct and indirect casualties.[10] Exactly one month after Hurricane Rita, Hurricane Wilma struck the southwest corner of Florida near Naples on October 24, 2005.[11] Also extremely costly, Hurricane Wilma resulted in approximately $29.9 billion in damages and sixty-three direct and indirect casualties.[12]

Although the Katrina Act created significant tax benefits to assist victims of Hurricane Katrina and those individuals displaced by the storm, Congress acknowledged the need for additional legislation.[13] The two primary goals were to (1) extend the tax benefits of the Katrina Act to the areas impacted by hurricanes Rita and Wilma, and (2) stimulate economic growth and development for businesses in the areas impacted by Hurricane Katrina.

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declared a disaster by the President. I.R.C. § 1400Q(a)(4). There is no regular income tax on up to $100,000 of withdrawals that are recontributed to a qualified plan or IRA within three years and three-year income averaging applies to those withdrawals that are not recontributed within three years. I.R.C. § 1400Q(a)(3).

[8] I.R.C. § 1400R; Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016 (codified as amended in scattered sections of 26 U.S.C.; *see* 26 U.S.C. § 201). The Katrina Act created the Hurricane Katrina Employee Retention Credit and added "Hurricane Katrina employee" as a member of a targeted group for purposes of the Work Opportunity Tax Credit. *See infra* note 39.

[9] RICHARD D. KNABB, JAMIE R. RHOME & DANIEL P. BROWN, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT HURRICANE KATRINA 18-26 SEPTEMBER 2005 (2005).

[10] *See* NOAA Satellite and Information Service, *supra* note 1.

[11] RICHARD J. PASCH, ERIC S. BLAKE, HUGH D. COBB III & DAVID P. ROBERTS, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT HURRICANE WILMA 15-25 OCTOBER 2005 (2006).

[12] NOAA Satellite and Information Service, *supra* note 1.

[13] Senators Trent Lott and Thad Cochran had a significant role in the passage of the GO Zone Act.

III. POLICY AND HISTORY

Beginning in the 1990s, Congress discussed numerous proposals to provide tax incentives for businesses to locate in economically depressed areas. In order to stimulate growth in certain areas, Congress passed the Revenue Reconciliation Act of 1993, which created the concept of empowerment zones and enterprise communities.[14] To be eligible for designation as an empowerment zone or enterprise community, an area must meet certain criteria regarding population and size; have a condition of pervasive poverty, unemployment, and general distress; and satisfy specified poverty thresholds.[15] The special tax incentives available for these areas include increased Internal Revenue Code (Code) Section 179 expensing,[16] employee tax credits,[17] and tax-exempt enterprise zone facility bonds that can be used to finance facilities used by an enterprise zone business in an

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[14] Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 416 (1993) I.R.C. § 1391(b)(1)-(2).

[15] I.R.C. §§ 1391 & 1393. Ninety-five areas may be designated as enterprise communities. I.R.C. § 1391(b)(1). Of that number, not more than sixty-five may be designated in urban areas and not more than thirty may be designated in rural areas. *Id.* In addition, eleven areas may be nominated as empowerment zones, with not more than eight designated in urban areas and not more than three designated in rural areas. I.R.C. § 1391(b)(2). The Secretary of Housing and Urban Development in the case of any nominated area that is located in an urban area, and the Secretary of Agriculture in the case of any nominated area that is located in a rural area, are responsible for making these designations. I.R.C. § 1393(a)(1). In Mississippi, Bolivar, Sunflower, Leflore, Washington, Humphreys, and Holmes counties have been designated as rural empowerment zones. I.R.S. Announcement 95-12, 1995-7 I.R.B. 71; I.R.C. § 1391.

[16] I.R.C. § 1397A. The amount that can be expensed under Code Section 179 is equal to the total cost of Code Section 179, subject to the phase-out limitations in Code Section 1397A(a)(2). *Id.*

[17] I.R.C. § 1396. Eligible employers are allowed a credit of up to twenty percent of the first $15,000 of "qualified zone wages" paid to each "qualified zone employee." I.R.C. § 1396(d). Qualified zone employees are employees that meet the following requirements: (1) substantially all of the services are performed within a renewal community in a trade or business of the employer, and (2) the principal place of abode of such employee while performing such services is within such renewal community. *Id.* Qualified zone wages means any wages paid or incurred by an employer for services performed by an employee while such employee is a qualified zone employee. I.R.C. § 1396(c). Qualified zone wages do not include wages taken into account for purposes of the Work Opportunity Credit. I.R.C. § 1396(c)(3).

empowerment zone or enterprise community.[18]

Congress then passed the Community Renewal Tax Relief Act of 2000, which created "renewal communities."[19] Renewal communities are areas requiring criteria similar to empowerment zones and enterprise communities.[20] The incentives available to renewal communities include a zero-percent capital gain rate for the sale of a "qualified community asset,"[21] a fifteen percent renewal community employment credit,[22] and a commercial revitalization deduction for certain properties located in renewal communities.[23]

In response to the devastating terrorist attacks on September 11, 2001, Congress passed the Job Creation and Worker Assistance Act of 2002 in order to stimulate growth and capital investment across the country.[24] The Job Creation and

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[18] I.R.C. § 1394. Enterprise zone facility bonds must meet the requirements under Code Section 1394, as well as the requirements for exempt facility bonds under Code Section 142. I.R.C. § 1394(a).

[19] Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-587 (2000). Section 1400E of the Internal Revenue Code was added by Section 101(a) of the Community Renewal Tax Relief Act of 2000. Areas in thirteen counties in west-central Mississippi (Adams, Attala, Claiborne, Copiah, Hinds, Holmes, Humphreys, Jefferson, Leake, Madison, Warren, Washington, Yazoo) qualify as renewal communities. News Release No. 02-013, Dep't of Housing and Urban Dev. (Jan. 24, 2002), *available at* www.hud.gov/news/release.cfm?content+pr02-013.cfm (last visited Nov. 13, 2007).

[20] I.R.C. § 1400E(a)(3).

[21] I.R.C. § 1400F. The asset must be acquired after December 31, 2001, and before January 1, 2010, and held for more than five years. *Id.* A "qualified community asset" includes: (1) qualified community stock (meaning original-issue stock purchased for cash in a renewal community business); (2) a qualified community partnership interest (meaning a partnership interest acquired for cash in a renewal community business); (3) qualified community business property (meaning tangible property originally used in a renewal community business by the taxpayer) that is purchased or substantially improved after December 31, 2001. *Id.*

[22] I.R.C. § 1400H. The credit is equal to fifteen percent of the first 20,000 of qualified zone wages paid to each qualified zone employee. *See supra* note 17.

[23] I.R.C. § 1400I. The deduction is applicable to certain new and rehabilitated property, which is placed in service in a renewal community zone on or before December 31, 2009. *Id.*

[24] Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (2002). The passage of this Act was intended to "accelerate purchases of equipment, promote capital investment, modernization, and growth, and . . . spur an economic recovery." H.R. REP. NO. 108-94, at 23 (2003). The Committee Report further states: "[a]s businesses accelerate their purchases of equipment current employment will

Worker Assistance Act of 2002 added paragraph (k) to Code Section 168, which provided a "bonus" depreciation of thirty percent for new, personal property acquired after September 10, 2001, and before January 1, 2005.[25] Further, the Code provides a fifty percent bonus depreciation for new, personal property acquired after May 5, 2003, and before January 1, 2005.[26] In 2002, the Job Creation and Worker Assistance Act added Code Section 1400L, which provided tax incentives and bond provisions to provide benefits to taxpayers in the portion of downtown Manhattan most significantly impacted by September 11, referred to as the New York Liberty Zone (the Liberty Zone).[27] Section 1400L of the Code, otherwise known as the "Liberty Zone Act," extended the thirty percent bonus depreciation deduction under Code Section 168(k) to the costs to rehabilitate or replace certain nonresidential real property and residential rental property located in the Liberty Zone and damaged or destroyed as a result of the terrorists attacks.[28] In addition, the Liberty Zone Act created a provision for "Qualified New York Liberty Bonds," which are tax-exempt facility bonds used to acquire, construct, and renovate certain real property and public utility property located in the Liberty Zone.[29] The Liberty Zone Act also expanded the Work Opportunity Tax

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increase to produce that equipment. Current business expansion also will increase employment opportunities in the years ahead." *Id.*

[25] I.R.C. § 168(k)(1). Under this Section, the bonus depreciation is not available for nonresidential real property or residential rental property. *Id.*

[26] I.R.C. § 168(k)(4).

[27] I.R.C. § 1400L(h). The New York Liberty Zone is "the area located on or south of Canal Street, East Broadway (east of its intersection with Canal Street), or Grand Street (east of its intersection with East Broadway) in the Borough of Manhattan in the City of New York, New York." *Id.*

[28] I.R.C. § 1400L(b). For example, if certain structural components (walls, floors, and plumbing fixtures) of a building are damaged or destroyed as a result of September 11, but the building is not destroyed, then only costs related to replacing the damaged or destroyed structural components qualify for the thirty percent bonus depreciation. Treas. Reg. § 1.1400L(b)-1(c)(2)(i)(B) (2007). In addition, property is ineligible for bonus depreciation under Code Section 1400L to the extent that it is eligible for bonus depreciation under Code Section 168(k). I.R.C. § 1400L(b)(2)(C)(i). In other words, property is eligible for only one thirty percent additional first-year depreciation. I.R.C. § 1400L(d).

[29] I.R.C. § 1400L(d).

Credit to certain New York Liberty Zone employees.[30]

IV. Overview of the Gulf Opportunity Zone Act of 2005

The provisions in the GO Zone Act were modeled after these special tax and bond incentives, and with a few exceptions, the language in the GO Zone Act is very similar to the language in the Liberty Zone Act. The GO Zone Act established bond provisions and significant tax incentives for businesses to encourage the rapid rebuilding of affected counties and parishes in Mississippi, Louisiana, and Alabama devastated by Hurricane Katrina. In addition, the GO Zone Act expanded the provisions of the Katrina Act to those affected by Hurricanes Rita and Wilma.[31] This legislation contains generous tax benefits that can help business owners rebuild their existing structures and construct new facilities. The law is also designed to help attract companies from outside the area to establish new operations within the affected region. These benefits, combined with state economic incentives, create very attractive opportunities for businesses to develop new facilities within the GO Zone in Mississippi. The two most significant incentives, the fifty percent bonus depreciation and the tax-exempt financing, will be discussed in a later section of the article. The following is a summary of additional incentives under the GO Zone Act:

Personal Property Deduction: The GO Zone Act increases to $200,000 the amount that eligible businesses can expense under the Code Section 179 for qualifying tangible personal property and computer software placed in service in the zone on or before

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[30] I.R.C. § 1400L(a). The Work Opportunity Tax Credit (WOTC) was originally available to employers who hire employees from certain targeted groups. I.R.C. § 51(a). The Liberty Zone Act extended the credit to certain qualified New York Liberty Zone business employees. I.R.C. § 1400L(a)(1).

[31] The GO Zone Act created separate Gulf Opportunity Zones (GO Zones) to address specific portions of the areas hit hardest that the Federal Emergency Management Agency determined as requiring both public and individual assistance from the federal government: the GO Zone (the Hurricane Katrina core disaster area), the Rita GO Zone, and the Wilma GO Zone. I.R.C. § 1400M. Although the GO Zone Act is applicable to the Katrina, Rita, and Wilma GO Zones, the more significant tax incentives, i.e. the tax-exempt bonds and bonus depreciation, are only available to the Katrina GO Zone.

December 31, 2008.[32] The deduction is phased out to the extent the amount of qualifying property placed in service in a year exceeds $1,000,000.[33]

Net Operating Losses: The GO Zone Act expanded the opportunity for businesses in the GO Zone to carry back their net operating losses.[34] Net operating losses attributable to bonus depreciation (GO Zone Losses) may be carried back five years instead of the usual two years, and may be carried forward twenty years. Passive losses, which are discussed in a later section of the article, may not be carried back, but can be carried forward indefinitely.[35]

Employee Retention Credit: The GO Zone Act expands the provisions of the Employee Retention Act which was included as part of the Katrina Act.[36] The Retention Credit is available to employers located in the GO Zone whose business was rendered inoperable as a result of the damage caused by Hurricane Katrina on any day after August 28, 2005, and before January 1, 2006.[37] The credit is equal to forty percent of qualifying wages up to $6,000 (for a maximum credit of $2,400 per qualifying employee) and only applies to wages paid prior to the earliest to occur of December 31, 2005, or the date the business resumed significant operations at that facility.[38]

Work Opportunity Tax Credit: The Work Opportunity Tax Credit is available for employers that hire workers after August 28, 2005, if the workers had a principal place of abode in the GO Zone on that date and were either (1) hired before August 28,

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[32] § 1400N(e). The original placed in service deadline for Section 179 property was December 31, 2007. Congress extended this deadline to December 31, 2008, through passage of the Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, 121 Stat. 204 (2007).

[33] § 1400N(e).

[34] § 1400N(k).

[35] WILLIAM S. MCKEE, WILLIAM F.. NELSON & ROBERT L.. WHITMIRE, FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS 2007; I.R.S. Notice 2005-64, 2005-36 I.R.B. (describing passive loss rules).

[36] I.R.C. § 1400R.

[37] I.R.C. § 1400R(a)(2)(A). The credit is only available for employees whose principal place of employment on August 28, 2005, was with an eligible employer in the GO Zone. I.R.C. § 1400R(a)(2)(B).

[38] I.R.C. § 1400R(a)(2)(C).

2007, for a job located in the GO Zone, or (2) displaced by Hurricane Katrina and hired on or before December 31, 2005, for a job located outside the GO Zone.[39] Eligible employers are allowed a credit of up to forty percent of the first $6,000 of "qualified first-year wages" paid to each employee (for a maximum credit of $2,400 per employee).[40]

Demolition and Cleanup Expenses: The GO Zone Act allows businesses to expense fifty percent of their demolition and cleanup expenses incurred through December 31, 2007.[41]

V. BONUS DEPRECIATION

The GO Zone Act allows for a significant acceleration of the normal depreciation deduction by allowing a bonus depreciation deduction in the first year qualified GO Zone property is placed in service.[42] The deduction is equal to fifty percent of the cost of the property, in addition to the normal depreciation deduction for the balance of such cost.

A. Requirements for Qualified GO Zone Property

(1) The property must be Modified Accelerated Cost Recovery System (MACRS) property with a recovery period of twenty years or less,[43] certain computer software, water utility property, qualified leasehold improvement property,

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[39] Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016 (codified as amended in scattered sections of 26 U.S.C.; *see* 26 U.S.C. § 201).

[40] *Id.* Qualified first-year wages are defined as wages attributable to service rendered during the one-year period beginning on the day the employee begins work for the employer. I.R.C. § 51. To be eligible for the forty percent credit, an employee must complete 400 hours of service during the one-year period beginning on the day the employee begins work for the employer. *Id.* If the employee completes at least 120 hours but less than 400 hours of service for the employer during the one-year period beginning on the day the employee begins work for the employer, the credit is reduced to twenty five percent. *Id.* If the eligible employee completes less that 120 hours of service, the credit is not applicable for that employee. *Id.*

[41] § 1400N(f).

[42] I.R.C. § 1400N(d).

[43] MACRS property is tangible, depreciable property that is generally placed in service after December 31, and is subject to the Section 168 accelerated cost recovery system. Treas. Reg. § 1.168(b)-1(a)(2) (2007).

nonresidential real property, residential rental property, or public utility property.[44] As a general rule, this includes most depreciable personal property, nonresidential real property, and residential rental property.[45]

(2) Substantially all of the use of the property must be in the GO Zone and in the active conduct of a trade or business by the property owner.[46] This requirement consists of a two-part test focusing on where and how the property is used.[47] At least eighty percent of the use of the property must be (1) inside the geographic boundaries of the GO Zone and (2) in an active trade or business of the property owner.[48]

The first part of the "substantially all" requirement is a geographic limitation.[49] Because the GO Zone Act covers ninety-one counties in three states, it was uncertain how the provision would be applicable to movable property, such as vehicles, boats and airplanes.[50] According to Internal Revenue Service Notice 2006-77, "if greater than 20 percent of the use of the property . . . is outside . . . the GO Zone, . . . the property is not GO Zone property and is not eligible for the GO Zone additional first year depreciation deduction."[51] In this notice, the Internal Revenue Service illustrated that a delivery truck purchased by the owner and operator of a furniture store does not qualify for the bonus depreciation if it is used more than eighty percent outside of the GO Zone, even if it is used one hundred percent of the time in the active conduct of the owner's business.[52] The same rationale is applicable to airplanes, boats, and any other type of movable personal property. Other factors, including the company's headquarters, where the property is serviced and

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[44] I.R.C. § 1400N(d)(2)(A)(i) (2000).

[45] *Id.*

[46] I.R.C. § 1400N(d)(2)(A)(ii) (2000).

[47] I.R.S. Notice 2006-77, 2006-40 I.R.B. 590 (Sept. 1, 2006).

[48] *Id.* The Treasury Regulations relating to the Liberty Zone Act were made applicable to the GO Zone Act in IRS Notice 2006-67. *See* I.R.C. § 1400(b)(2) (2000).

[49] *Id.*

[50] Since the Liberty Zone Act covered only a small portion of lower Manhattan, there is no guidance on how this provision is applicable to such movable property.

[51] I.R.S. Notice 2006-77, 2006-40 I.R.B. 590 (Sept. 1, 2006).

[52] *Id.*

maintained, and where the property is stored during non-use, do not seem to be relevant to this inquiry.[53]

In addition to the physical use requirement, the property must be used in the active conduct of the property owner's trade or business.[54] For purposes of this active trade or business requirement, the owner of property can either be a business entity (a partnership, limited liability company (LLC), or corporation) or an individual owner.[55] Although the active trade or business requirement is tested at the entity level, if the entity is entitled to the fifty percent bonus depreciation, unless the entity is a C-Corporation, this benefit will generally flow through to the individual owners in the form of a loss.[56] In order for the individual owners to utilize the loss generated by the fifty percent bonus depreciation, the individual owners must meet certain requirements under the Code, which are discussed in a later section of this article.[57]

In Notice 2006-77, the Internal Revenue Service stated that a taxpayer[58] is considered to actively conduct a trade or business for purposes of the fifty percent bonus depreciation if the taxpayer "meaningfully participates in the management and operation of the business."[59] Notice 2006-77 provides helpful

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[53] Thus, for example, with respect to an airplane, only actual flight time qualifies as "use" for purposes of the substantially all test, even if the plane is hangered in the GO Zone more than eighty percent of the time in the tax year.

[54] I.R.S. Notice 2006-77, 2006-40 I.R.B. (Sept. 1, 2006).

[55] *Id.* This means that all individual owners of the entity do not necessarily have to be in an active business, as long as the entity qualifies as an active business.

[56] *Id.* This assumes that the entity is treated as a partnership for tax purposes and the fifty percent depreciation deduction will offset all of the entity's income for the current year.

[57] Individuals and partners in a partnership (and members of an LLC) are subject to certain provisions in the Code related to the deductibility of losses derived from an activity in which they participate. Corporations are generally not subject to these requirements.

[58] The "taxpayer" can either be an individual or a business entity.

[59] I.R.S. Notice 2006-77, 2006-40 I.R.B. 590 (Sept. 1, 2006). Several provisions in the Code are helpful in determining the "active conduct of a trade or business." For example, the IRS has referred to "active conduct" standards in I.R.C. § 355(b) (2000) and Treas. Reg. § 1.179-2(c)(6)(ii) (2006). Both of these standards required significant or meaningful participation in a trade or business. In addition, the material participation rules in I.R.C. § 469 (2000) may also be helpful in determining whether a taxpayer is in

examples illustrating what constitutes the active conduct of a trade or business.[60] In the first example, an LLC constructs an apartment building and a member of the LLC manages and operates the apartment building.[61] The LLC meaningfully participates in the management and operation of the business and is thus an active trade or business.[62] In the third example, a partnership constructs and leases a commercial building on a triple net lease. Because of the triple net lease, the partnership does not meaningfully participate in the management and operations of the building, and thus is not engaged in an active trade or business.[63]

The application of the active trade or business test to commercial and residential rental property can be a difficult process, especially combined with the loss limitation rules in the Code.[64] Although not directly related to fifty percent bonus depreciation, Internal Revenue Service Revenue Ruling 2006-34 lists several factors to consider in determining whether an active trade or business exists in connection with the ownership and use of rental real property. [65] Among these include the amount of time the taxpayer devotes to the trade or business; whether an office was maintained during regular business hours; the extent to which the taxpayer was actively involved in finding new tenants and negotiating and executing leases; and the

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the active conduct of a trade or business. However, certain management services are not taken into account if another person or company is paid for such services or if such services are performed by independent contractors. *See* Treas. Reg. § 1.469-5T(b)(2)(ii); Treas. Reg. § 1.355-3(b)(2)(iii) (2006).

[60] I.R.S. Notice 2006-77, 2006-40 I.R.B. 590 (Sept. 1, 2006).

[61] *Id.* Note that all members of the LLC do not have to actively participate in the operation and management of the property, as long as one member (or an employee of the LLC) performs these functions. *See supra* note 55. However, those members who do not participate in the management of the property will probably be limited by the passive activity rules. *See infra* note 68.

[62] *Id.* The result would be the same if an employee of the LLC managed and operated the property.

[63] *Id.* Although common to most commercial transactions, it is clear that use of a triple net lease will disqualify the taxpayer from using the bonus depreciation. Thus, it is important to structure the lease whereas the lessor is responsible for maintenance, taxes and insurance on the property.

[64] *See* I.R.C. § 469 (2000).

[65] Rev. Rul. 2006-34, 2006-26 I.R.B. 1171.

extent to which the taxpayer personally made, arranged for, performed, or supervised repairs and maintenance to the property and handled tenant repair requests and complaints.[66]

This Revenue Ruling has made clear that if a taxpayer uses an unrelated management company to operate and manage the property, the taxpayer is not using the property in an active trade or business.[67] Thus, if a taxpayer uses an unrelated management company to operate and manage the property, the property will probably not qualify for the fifty percent bonus depreciation. However, this revenue ruling states that the use of a *related* management company may be sufficient to constitute an active trade or business.[68]

(3) The original use of the property must commence in the GO Zone with the property owner on or after August 28, 2005.[69] In other words, the purchase price of any property "used" in the GO Zone prior to August 28, 2005, does not qualify for bonus depreciation. The purchase price of used personal property is eligible as long as it was previously used outside the zone.[70]

The fifty percent bonus depreciation is available for costs incurred on new projects and costs incurred for the replacement,

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[66] *Id.*

[67] *Id.*

[68] *Id.* This requires that at least one member of the entity (or the individual owner of the property) have an ownership interest in the management company. *Id.* The percentage of ownership in this case is not entirely clear, but an example in the Revenue Ruling approves a twenty percent ownership interest in the management company. *Id.* In addition, the material participation rules in I.R.C. § 469 are consistent with this position. *See infra* note 101.

[69] I.R.C. § 1400N(d)(iii) (2000). The term "original use" was derived from the rules applicable to investment credit property under Code Section 48. Treas. Reg. § 1.48-2(b)(7) (2006).

> The term original use means the first use to which the property is put, whether or not such use corresponds to the use of such property by the taxpayer. For example, a reconditioned or rebuilt machine acquired by the taxpayer will not be treated as being put to original use by the taxpayer.

Id.

[70] Clearly, any property constructed and put to use before August 28, 2005, does not qualify. However, absent any exceptions, even if property is constructed after August 28, 2005, a subsequent purchaser will not be eligible for the fifty percent bonus depreciation if the property was "used" prior to its sale. Temp. Treas. Reg. § 1.168(k)-1(b)(3) (2007).

renovation, or rehabilitation of existing property.[71] The costs for replacement, renovation, or rehabilitation of existing property are treated as separate property for purposes of the GO Zone Act.[72] In addition, there is no requirement that property must have been damaged by Hurricane Katrina.[73]

It is important to keep in mind that the involuntary conversion rules are applicable to taxpayers who receive insurance proceeds for their damaged property.[74] Generally, if insurance proceeds are not reinvested in the damaged property or similar property, the taxpayer must recognize gain on the difference between the taxpayer's adjusted basis in the damaged property and the amount of the insurance proceeds.[75] However, if the taxpayer uses the insurance proceeds to either rebuild the property or acquire similar property, the gain is deferred until the taxpayer later disposes of his investment in the property.[76] The fifty percent bonus deprecation is available to the taxpayer who reinvests the insurance proceeds in the damaged property or similar property, but only to the extent of the taxpayer's adjusted basis in the damaged property and any additional capital invested in the renovated property or similar property, in excess of the insurance proceeds.[77]

(4) The property must be acquired by purchase on or after August 28, 2005, but only if no written binding contract for the acquisition was in effect before August 28, 2005.[78] A binding

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[71] *Id.* "[A]dditional capital expenditures incurred by a taxpayer to recondition or rebuild property acquired or owned by the taxpayer satisfies the original use requirement." *Id.* The same rules are applicable to GO-qualified GO Zone Property acquired after August 28, 2005.

[72] *Id.*

[73] I.R.C. § 1400N(d) (2000). In the Liberty Zone Act, the property must have been damaged or destroyed by the terrorist attacks of September 11, 2001. *See supra* note 28.

[74] Temp. Treas. Reg. § 1.168(i)-6T (2006); I.R.C. § 1033 (2000).

[75] I.R.C. § 1033 (2000).

[76] Temp. Treas. Reg. § 1.168(i)-6T (2006). The mechanism for deferring the gain is the requirement that the taxpayer use his adjusted basis in the damaged property as the depreciable basis for the renovated property or similar property. *Id.* The adjusted basis in the damaged property is commonly referred to as a "carry-over basis." *Id.*

[77] *Id.* In other words, the taxpayer cannot apply the fifty percent bonus depreciation to the capital expenditures paid for with the insurance proceeds.

[78] I.R.C. § 1400N(d)(2)(A)(ii) (2000).

contract is a contract that is enforceable under state law and does not limit damages to a specified amount.[79]

In addition, the construction of the property must begin on or after August 28, 2005.[80] In general, if a taxpayer constructs property for use in its trade or business, the acquisition rule of the GO Zone Act is satisfied if the taxpayer begins constructing the property after August 28, 2005, and before January 1, 2008.[81] In addition, property that is constructed for the taxpayer by another person qualifies for the acquisition rule if construction of the property begins on or after August 28, 2005, and before January 1, 2008.[82]

(5) With one exception, personal property must be placed in service by the taxpayer on or before December 31, 2007, and real property must be placed in service by the taxpayer on or before December 31, 2008.[83] For certain portions of the GO Zone, the bonus depreciation placed in service date for real property has been extended to December 31, 2010.[84] In addition, this extension applies to personal property if substantially all of the

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[79] Temp. Treas. Reg. § 1.168(k)-1(b)(4)(ii) (2006).

[80] Temp. Treas. Reg. § 1.168(k)-1(b)(4)(iii)(A) (2006). The construction of property begins when "physical work of a significant nature begins." Treas. Reg. § 1.168(k)-1(b)(4)(iii)(B) (2006).

[81] Temp. Treas. Reg. § 1.168(k)-1(b)(4)(iii)(A) (2006). This is called the "self-constructed" property rule.

[82] *Id.* For purposes of the acquisition rule, a contract for the purchase of property does not include a construction loan related to the construction of property.

[83] *Id.* An asset subject to depreciation is considered to be first placed in service when it is "first placed in a condition or state of readiness and availability for a specifically assigned function whether in a trade or business, in the production of income, in a tax-exempt activity, or in a personal activity." Treas. Reg. § 1.167(a)-11(e) (2006). The following three elements must be proved: readiness, availability, and capability to perform intended function. *Id.*

[84] *Id.* Congress acknowledged this critical need for more time to rebuild those areas most severely devastated by Hurricane Katrina. As a result, the Tax Relief and Health Care Act of 2006 was passed, which extended certain deadlines for benefiting from the bonus depreciation under the GO Zone Act. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006). The extension applies to those portions of the GO Zone which are in any county or parish which is identified as being a county or parish in which hurricanes occurring during 2005 damaged (in the aggregate) more than sixty percent of the housing units in such county or parish which were occupied (determined according to the 2000 Census); the bonus depreciation "placed in service date" for real property has been extended to December 31, 2010. *Id.*

use of the personal property is in a building which qualifies for the extension and such personal property is placed in service by the taxpayer not later than ninety days after such building is placed in service.[85] The following parishes in Louisiana qualify for the extension: Calcasieu, Cameron, Orleans, Plaquemines, St. Bernard, St. Tammany, and Washington.[86] The following counties in Mississippi qualify for the extension: Hancock, Harrison, Jackson, Pearl River, and Stone.[87]

B. Limitations on bonus depreciation

Property used in connection with any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, liquor store, gambling or animal racing property is not eligible for the fifty percent bonus depreciation.[88] In addition, property any portion of which is financed with tax-exempt bonds, including tax-exempt GO Zone bonds, is excluded from the fifty percent bonus depreciation.[89]

Additionally, when property is sold, or if the property ceases to be qualified GO Zone property, the taxpayer is subject to the recapture rules of the Code.[90] The taxpayer must recognize the following amount as ordinary income: the difference between the amount of the total deprecation taken on the property, including the fifty percent bonus depreciation, and the amount of the normal deprecation allowed for the property.[91]

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[85] *Id.*

[86] I.R.S. Notice 2007-36, 2007-17 I.R.B. 1000 (Mar. 29, 2007).

[87] *Id.*

[88] I.R.C. § 1400N(p)(3)(A)(i) (2000).

[89] I.R.C. § 1400N(d)(2)(B)(ii) (2000); I.R.C. § 168(g)(5) (2000). Additionally, Alternative Depreciation System (ADS) property, including property leased to a tax-exempt entity under a disqualified lease, is excluded from the fifty percent bonus depreciation. I.R.C. § 168(g).

[90] I.R.C. § 1400N(d)(5) (2000). This would be the case, for example, if the taxpayer failed to use the property in an active leasing business.

[91] I.R.C. § 1250(a)(1) (2000). For example, if the property was purchased for $2,500,000, the deprecation allowance for the first year, including the fifty percent bonus depreciation, is $1,274,625. If the taxpayer sells the property in year two, the taxpayer must recognize the following amount as ordinary income: the difference between the total depreciation taken for years one and two ($1,320,075) and the normal depreciation for years one and two ($140,150), which is approximately $1,179,925. BUTLER, SNOW,

Thus, it is advisable to hold the property for an extended period of time in order to avoid the recapture provisions.

Lastly, the "At-risk" and "Passive Activity" rules of Code Sections 465 and 469, respectively, are applicable to losses attributable to the fifty percent bonus depreciation, and are applied on an individual basis.[92] This means that each individual owner of an entity that owns property, and each individual owner of property will be subject to these limitations.[93]

Code Section 465 provides that an individual may only deduct losses to the extent of the individual's "at risk" investment in the activity producing the loss.[94] To be considered at risk, the individual must either personally invest money or property in the venture or incur personal liability for borrowed funds used in the venture.[95] There is an important exception for certain real property activities: individuals engaged in the activity of holding real property are considered to be at risk for their share of "qualified nonrecourse financing."[96]

Code Section 469 provides another potential limitation for individuals who have passive activity losses. A passive activity loss is the amount by which the aggregate losses from all passive activities exceed the aggregate income from such activities.[97] Generally, passive losses can only be used to the

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O'MARA, STEVENS, & CANNADA, PLLC, THE GULF OPPORTUNITY ZONE ACT OF 2005: BENEFITS AVAILABLE FOR BUSINESSES (2007).

[92] I.R.C. §§ 465, 469 (2000).

[93] *Id.*

[94] I.R.C. § 465(a)(1)(B) (2000).

[95] I.R.C. § 465(b) (2000). In other words, the financing must be recourse with respect to the taxpayer.

[96] I.R.C. § 465(b)(6) (2000). Debt is qualified nonrecourse financing if the following requirements are met: (1) the debt is secured by the real property used in the activity; (2) the lender is an unrelated person or institution actively and regularly engaged in the business of lending money; however, if the lender is related to the individual, the financing must be "commercially reasonable"; (3) the property is not seller financed; (4) the debt is not convertible into an equity interest in the property; and (5) the debt is not personally guaranteed by any other individual. *Id.*

[97] Temp. Treas. Reg. § 1.469-2T(b)(1) (2007). Gain from the disposition of property used in a passive activity will be treated as passive activity gross income. Temp. Treas. Reg. § 1.469-2T(c)(2)(i)(A)(2). In other words, passive losses from rental real estate activities can offset gains derived from the disposition of other rental real estate property

extent they offset passive income, and a passive activity loss cannot be used to offset net active income or portfolio income.[98]

The general definition of a passive activity is an activity that involves the conduct of any trade or business in which the individual does not materially participate.[99] An individual will be treated as materially participating in an activity if the individual is involved in the operations of the activity on a regular, continuous, and substantial basis.[100] If an individual meets any one of the following seven tests, he or she will be considered a material participant in the activity:

(1) the individual participates in the activity for more than five hundred hours during such year;[101]

(2) the individual's participation in the activity constitutes substantially all of the participation in the activity of all individuals (including employees) for the year;[102]

(3) the individual participates in the activity for more than one hundred hours and such participation in the activity for the year is not less than the participation in the activity of any other individual (including employees) for the year;[103]

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as long as that property was used in a passive activity.

[98] Temp. Treas. Reg. § 1.469-2T(c)(2)(i)(A)(2) (2007). Net active income is the individual's taxable income for the taxable year without regard to passive income or loss and portfolio income. Temp. Treas. Reg. § 1.469-1T(g)(4)(ii). Portfolio income is income from interest, dividends, annuities, or royalties not derived in the ordinary course of a trade or business (or from working capital used in the business), and gain attributable to property producing such income and property held for investment. Temp. Treas. Reg. §1.469-2T(c)(3)(i). For these purposes, the term "investment" excludes any interest in a passive activity. *Id.*

[99] I.R.C. § 469(c)(1) (2000).

[100] I.R.C. § 469(h) (2000).

[101] Temp. Treas. Reg. § 1.469-5T(a)(1) (2007). This is the generally the simplest and most common test for a taxpayer to meet. *See* MICHAEL CARNEVALE, DEBORAH HARRINGTON & AMY SUTTON: FEDERAL INCOME TAXATION OF PASSIVE ACTIVITIES § 5.02 QUANTITATIVE GUIDANCE: THE SEVEN TESTS (RIA 2004). As few as ten hours per week should be sufficient to satisfy this test. *Id.*

[102] Temp. Treas. Reg. § 1.469-5T(a)(2) (2007).

[103] Temp. Treas. Reg. § 1.469-5T(a)(3) (2007). *See* CARNEVALE ET AL., *supra* note 101. An individual meets this test if he or she participates more than any one person, not more than the collective work of other people. *Id.* For example, if the individual owns a condo-hotel unit and hires a property manager, the individual would only have to spend more time than any one employee of the property manager. *Id.*; *but see supra* note 65. This assumes the property meets the seven day exception to a rental activity. *See infra*

(4) the activity is a significant participation activity and the individual's aggregate participation in all significant participation activities during the year exceeds five hundred hours;[104]

(5) the individual materially participated in the activity for any five taxable years (whether or not consecutive) during the ten taxable years that immediately preceded the taxable year;[105]

(6) the activity is a personal service activity and the individual materially participated in the activity for any three taxable years (whether or not consecutive) preceding the taxable year;[106] or

(7) based on all of the facts and circumstances, the individual participates in the activity on a regular, continuous, and substantial basis during such year.[107]

It is important to note that a limited partner is not considered a material participant unless the individual materially participates under numbers (1), (5), or (6) of the preceding seven tests. In addition, absent two exceptions, rental activities are always passive activities regardless of the level of participation in the rental activity by the individual.[108] In other

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note 105.

[104] Temp. Treas. Reg. § 1.469-5T(a)(4) (1988). A significant participation activity is a trade or business activity in which the individual participates for more than one hundred hours during the year and would be an activity in which the individual does not materially participate for the taxable year if material participation for such year were determined without regard to this test. *Id.* This test was created for individuals who participate in several different activities during the year. *Id.*

[105] Temp. Treas. Reg. § 1.469-5T(a)(5) (2007).

[106] Temp. Treas. Reg. § 1.469-5T(a)(6) (2007). Examples of personal service activities include services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, or consulting. Temp. Treas. Reg. § 1.469-1T(e)(4).

[107] Temp. Treas. Reg. § 1.469-5T(a)(7) (1988). An individual's management services are generally not taken into account unless no person (or entity) other than the individual who performs management services gets paid for such services and no person (or entity) performs more management services than the individual. Temp. Treas. Reg. § 1.469-5T(b)(2)i(i) (2007). *See* Mordkin v. Comm'r, 71 T.C.M. 2796 (1996) (no material participation for purposes of facts and circumstances test because management company paid to perform management services).

[108] I.R.C. § 469(c)(2) (2007). A rental activity is an activity that generates payments that are principally for the use of tangible personal and real property. I.R.C. § 469(j)(8). Thus, the rental rule is also applicable if an individual rents property (either owned outright or in a separate LLC) to an active business entity in which the individual owns

words, unless the individual meets one of two exceptions, the losses generated from the fifty percent bonus depreciation applicable to all rental property will be considered passive activity losses.[109]

The first exception for rental activities applies to individuals in real property businesses who are considered real estate professionals.[110] A person is a real estate professional if :

(1) more than one-half of the personal services performed in trades or businesses by the individual during such taxable year are performed in real property trades or businesses in which the individual materially participates,[111] and

(2) such individual "performs more than 750 hours of service during the taxable year in real property trades or businesses in which the individual materially participates."[112]

Once the individual is determined to be a real estate professional, the "per se" passive rule with respect to rental real estate no longer applies to the individual.[113] As a result, if the individual materially participates in the rental activity that generates the loss, the rental activity will not be a passive activity with respect to the individual.[114] In other words, even if the individual meets the eligibility requirements above with respect to a real estate professional, the individual's rental real estate activities remain subject to the material participation

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an interest. Temp. Treas. Reg. § 1.469-1T(e) (2007). However, if the taxpayer contributes the use of the property to the entity, rather than rents the property to the entity, the rental rule is not applicable because there is no rental activity involved. *Id.* In certain situations, the entity could pay the individual in the form of guaranteed payments rather than rents. *Id.*

[109] There are also several exceptions to the definition of a rental activity. For example, rental activities do not include activities if the "average period of customer use" is seven days or less. Temp. Treas. Reg. § 1.469- 1T(e)(3)(ii)(A) (1988). For example, the daily rentals of automobiles and hotel rooms are generally not considered rental activities.

[110] I.R.C. § 469(c)(7)(A) (2008).

[111] I.R.C. § 469(c)(7)(B)(i) (2008). A real property trade or business means any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business. I.R.C. § 469(c)(7)(C).

[112] I.R.C. § 469(c)(7)(B)(ii) (2008).

[113] I.R.C. § 469(c)(7)(A)(i) (2008).

[114] *Id.*

requirement.[115] Rental real estate management activities may be taken into account in determining material participation, but only to the extent they are conducted in connection with property owned by the individual.[116]

The second exception to the passive limitation for rental activity allows an individual to offset up to $25,000 against non-passive income if the individual "actively participates" in the rental activity.[117] The active participation requirement is less stringent than material participation because it does not require regular, continuous, and substantial involvement.[118]

C. Application to Certain Businesses

The bonus depreciation works best for an operating business such as a manufacturing or warehousing facility, because these businesses generally are owner-operated and owner-managed. On the other hand, for certain individuals and businesses, particularly those owning commercial or residential rental property that is leased to other individuals or entities, the "active trade or business requirement" is the biggest obstacle for the bonus depreciation because it requires that the property owner or its employees perform significant services with respect to the operation and management of property.

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[115] An individual may elect to "group" his rental activities for purposes of the material participation requirements. I.R.C. § 469(c)(7)(A)(ii). If the individual does not make such election, all rental activities are considered separate activities for purposes of material participation. *Id.*

[116] *See* CARNEVALE ET AL., *supra* note 101. An owner of rental real estate who manages the properties will be considered a material participant if (1) the owner is not a limited partner and the hours incurred in such management results in the owner meeting one of the seven tests in the Treasury Regulations, or (2) if the owner is a limited partner and the hours incurred in such management results in the owner meeting the special rule for limited partners. *Id.* Examples of personal services which count towards material participation are time spent leasing space, maintenance, reporting, negotiating, and purchasing activities. *Id.* Management activities conducted by the owner of real estate count even if they are conducted through a separate entity in which the individual is a substantial owner. *Id.* at § 11.02.

[117] I.R.C. § 469(i) (2007). An individual is an active participant in the activity only if his interest in the activity is at least ten percent or more (by value) of all interests in the activity. I.R.C. § 469(i)(6)(A).

[118] This exception is phased out if the individual's adjusted gross income exceeds $100,000. I.R.C. § 469(i)(3).

Commercial property is often leased using a triple net lease whereby the tenant is responsible for paying all taxes, insurance, and maintenance expenses. In addition, owners of commercial and residential rental property often hire a management company or place the property in a rental program or association whereby an unrelated third party is responsible for the operation and management of the property. Since the Internal Revenue Service has issued guidance stating that the use of these common practices is *not* the active conduct of a trade or business, individuals and entities should consider other alternatives for meeting the active trade or business requirement under the GO Zone Act.[119]

Further, even if an individual or entity qualifies for the bonus depreciation, the passive activity rules may affect an individual's ability to utilize losses generated by the bonus depreciation. The passive activity rules generally involve strenuous requirements with regard to the time and effort involved in the management and operation of property. In addition, unless an individual owner is involved in a real property trade or business on a full-time basis, the ownership of commercial or residential rental property is a passive activity regardless of the individual's time and effort involved. As stated earlier, the determination of whether an activity is passive is a complex fact-specific analysis, and an individual should consult with his or her independent tax advisor to determine whether the fifty percent bonus depreciation will provide an immediate tax benefit to the direct or indirect owner(s) of the property.

The passive activity rules are also an obstacle for most investor-driven projects because the investors are typically involved on a passive basis. Because of the active trade or business requirement and the passive activity rules, individuals interested in commercial and residential rental projects and investor-driven projects should probably consider alternatives for structuring their business to take advantage of the bonus depreciation. Alternatively, commercial rental projects and investor-driven projects (excluding residential rental property)

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[119] *See supra* note 65.

should consider tax-exempt bond financing as an alternative to the bonus depreciation.

Lastly, the casino industry should be able to receive significant advantages from the bonus depreciation, despite limitations imposed upon them in the legislation.[120] The GO Zone Act provides that gambling property is excluded from the bonus depreciation; however real property that is not dedicated to gambling, i.e. restaurants, hotels, parking garages, etc., is eligible for the bonus depreciation.[121]

Unlike the GO Zone bonds discussed below, it is not necessary to make a formal request for the bonus depreciation because it is a self-reporting tax item. However, in the event of an audit, individuals will be expected to justify all positions taken with respect to the fifty percent bonus depreciation and the passive activity rules. Individuals may establish "any reasonable means" to identify services performed in an activity, including calendars, appointment books, or time reports.[122]

VI. TAX-EXEMPT BOND FINANCING

The GO Zone Act authorizes the use of tax-exempt, qualified private activity bonds to finance the development of a wide array of commercial projects to be located in the GO Zone on or after August 28, 2005.[123] Qualified issuers in Mississippi may issue in excess of $4.9 billion in tax-exempt "GO Zone bonds," while qualified issuers in Louisiana may issue nearly

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[120] I.R.C. § 1400N(p) (2007). The Go Zone Act provides that "any gambling or animal racing property" is excluded from the bonus depreciation. I.R.C. § 1400N(p)(3)(B) (2008).

[121] The GO Zone Act further provides that the exclusion only applies to "any equipment, furniture, software, or other property used directly in connection with gambling" and "the portion of any real property (determined by square footage) which is dedicated to gambling." I.R.C. § 1400(p)(B)(i)(II). The Technical Explanation of the GO Zone Act illustrates this provision using a building that is both a casino and a hotel and concludes that the portion of the building used solely for the hotel would be eligible for the bonus depreciation.

[122] Temp. Treas. Reg. § 1.469-5T(f)(4) (1988). Handwritten notes prepared two or more years after the services were performed and excessive hours claimed in relation to work performed are not reasonable means for providing this documentation. *See* Fowler v. Comm'r, T.C.M. (CCH) 281 (2002); Bailey v. Comm'r, T.C.M. (CCH) 868 (2001).

[123] I.R.C. § 1400N(a) (2007).

$7.9 billion and in excess of $2.1 billion in Alabama.[124] Private business owners and corporations located in the GO Zone have until December 31, 2010, to take advantage of tax-exempt financing utilizing GO Zone bonds to acquire, construct, reconstruct, or renovate non-residential real property, qualified residential rental projects, and public utility property.[125] Absent gaming and certain other businesses, tax-exempt, private activity bonds are available through the GO Zone Act to finance development of a wide array of commercial projects in the GO Zone. Tax-exempt financing may result in savings of up to two hundred basis points in interest costs per year for private business owners and corporations that participate.

A. Requirements for Tax-Exempt GO Zone Bonds

Interest on state and local bonds is exempt from inclusion in gross income under Section 103 of the Code.[126] Generally, state and local bonds are classified as either qualified private activity bonds or governmental bonds. While governmental bonds must be used primarily for governmental functions, qualified private activity bonds are generally issued by state or local governments to provide financing for private businesses and individuals.[127] Examples of private activity bonds include exempt facility bonds, qualified mortgage revenue bonds, and small issue bonds.[128] Under the GO Zone Act, GO Zone bonds are either treated as exempt facility bonds or qualified mortgage revenue bonds.[129] Thus, in addition to the requirements under the GO Zone Act, the Code imposes general requirements for the issuance of qualified private activity bonds. Certain requirements for the issuance of GO Zone bonds under the Code,

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[124] I.R.C. § 1400N(d)(3); *see also* I.R.S. Notice 2006-21, 2006-12 I.R.B. 643.

[125] *See generally* I.R.C. § 1400N(a) (2007).

[126] I.R.C. § 103(a) (2007).

[127] *Id.*

[128] Exempt facility bonds are authorized by Code Section 142, qualified mortgage revenue bonds are authorized by Code Section 143, and small issue bonds are authorized by Code Section 144. In addition, private activity bonds can be veterans' mortgage bonds, redevelopment bonds, Section 501(c)(3) bonds, and student loan bonds.

[129] I.R.C. § 1400N(a)(1) (2007).

as well as the general requirements for qualified private activity bonds under the Code include the following:

(1) GO Zone bonds must be issued on or before January 1, 2011,[130] by qualified issuers in the states of Alabama, Louisiana or Mississippi.[131]

(2) GO Zone bonds are treated as qualified mortgage revenue bonds if the issuance meets the requirements for qualified mortgage revenue bonds under the Code.[132] GO Zone bonds are treated as exempt facility bonds if ninety-five percent or more of the net proceeds[133] of the bonds are used for "qualified project costs."[134] Qualified project costs are defined as "the cost of any qualified residential rental project"[135] and the "acquisition, construction, reconstruction and renovation of [certain] nonresidential real property (including fixed improvements thereon)"[136] and public utility property located in the GO Zone.[137]

The Joint Committee Report on tax-exempt GO Zone bond financing states that the definition of qualified project costs

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[130] I.R.C. § 1400N(a)(2)(D).

[131] I.R.C. § 1400N(a)(2)(B). This includes any political subdivision of these states. *Id.* In Mississippi, the Mississippi Business Finance Corporation and the Mississippi Development Bank are eligible issuers of GO Zone bonds. Mississippi Business Finance Corporation, http://www.msbusinessfinance.com/msdevbank.html (last visited Mar. 4, 2008). In addition, GO Zone bonds must be designated by either the state bond commission or the governor of such state. I.R.C. § 1400N(a)(2)(C).

[132] *See* I.R.C. § 143 (2008).

[133] I.R.C. § 150(a)(3) (2008). The term net proceeds means the proceeds of a bond issue reduced by amounts in a reasonably required reserve or replacement fund. *Id.*

[134] I.R.C. § 1400N(a)(2)(A)(i) (2008).

[135] I.R.C. § 1400N(a)(4)(A)(i) (2008). The GO Zone Act applies a different standard than the median income threshold test in Code Section 142 by increasing the median gross income threshold. *See* I.R.C. §§ 142(d)(1), 1400N(a)(5). A project within the GO Zone is a qualified residential rental project if twenty percent or more of the residential units in such project are occupied by individuals whose income is sixty percent or less of area median gross income (the 20-60 Test) or if forty percent or more of the residential units in such project are occupied by individuals whose income is seventy percent or less of area median gross income (the 40-70 Test). *See* I.R.C. § 1400N(a)(5).

[136] I.R.C. § 1400N(a)(2), (4) (2008). Public utility property is defined as property used in the business of furnishing electricity, gas, energy, telephone service, etc., if the rates for furnishing such sale have been approved by a state or political subdivision thereof. I.R.C. § 168(i)(10).

[137] I.R.C. § 1400N(a)(4) (2008).

includes "buildings and their structural components and fixed improvements associated with such property."[138] The term "permanent improvement" has been defined as "any cost that adds to the value of the property, prolongs its useful life, or adapts it to new uses."[139]

An important limitation unique to the GO Zone Act is that proceeds of GO Zone bonds may not be used to finance "movable fixtures and equipment."[140] Although there is limited guidance under the Code as to the definition of "movable fixtures and equipment," "movable fixtures and equipment" will generally not include components of an industrial plant or large equipment permanently installed into a facility.[141] The purpose of this limitation is to ensure that property financed with the proceeds of GO Zone bonds remain in the GO Zone.[142]

(3) Generally, for the acquisition of property to be a qualified cost for purposes of the exempt facility bond rules, the purchaser of the property using exempt facility bond proceeds must be the first user of the property pursuant to such acquisition.[143] This requirement is not applicable to existing property financed with proceeds of exempt facility bonds if the

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[138] STAFF OF H. COMM. ON TAXATION, TECHNICAL EXPLANATION OF H.R. 4440, GULF OPPORTUNITY ZONE ACT OF 2005 (2005) [hereinafter *Gulf Opportunity Zone Act*]. The Report states that "costs associated with improving a facility may be permitted project costs if such costs are chargeable to the capital account of the facility." *Id.* The Joint Committee Report uses the example of installing equipment that enhances the pollution control of a manufacturing facility. *Id.*

[139] Treas. Reg. § 1.263(a)-1(b) (as amended 1965). The IRS has developed the following six factors with respect to the classification of property:

> (1) the manner in which the property is affixed to real property; (2) whether the property was designed to be easily removable or to remain in place indefinitely; (3) whether the property has been moved since its initial installation; (4) any circumstances that suggest the expected period of affixation (e.g., a lease that requires removal of the property upon its expiration); (5) the amount of damage that removal of the property would cause to the property itself or to the real property to which it is affixed; and (6) the extent of the effort that would be required to remove the property, in terms of time and expense.

Treas. Reg. § 1.897-1(b)(3)(iii)(c)(1)-(6) (1984).

[140] I.R.C. § 1400N(a)(3)(B) (2008).

[141] *See Gulf Opportunity Zone Act*, *supra* note 139.

[142] *Id.*

[143] I.R.C. § 147(d)(1) (2007).

rehabilitation expenditures with respect to such property equal or exceed at least fifteen percent of the portion of the cost of acquiring the property.[144] However, the GO Zone Act increased this percentage, requiring that rehabilitation expenditures with respect to existing property acquired in the GO Zone equal or exceed at least fifty percent of the portion of the cost of acquiring the property.[145] This percentage was increased to ensure that only existing properties most severely damaged by Hurricane Katrina qualify for GO Zone bond financing.

(4) There are further restrictions on the use of the proceeds of GO Zone-exempt facility bonds: no more than twenty-five percent of the proceeds of GO Zone bonds may be used for the acquisition of land[146] and no more than two percent of the proceeds may be used to pay issuance costs.[147] In addition, no portion of the proceeds of GO Zone bonds may be used to finance a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack, or other facility used for gambling, or liquor store.[148] If depreciable property is purchased with the proceeds of GO Zone bonds, then the company is not permitted to also use the fifty percent bonus depreciation with respect to such property.

(5) The maximum term of the GO Zone bonds must be equal

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[144] I.R.C. § 147(d)(2). Rehabilitation expenditures are amounts that are "properly chargeable to [the] capital account which [are] incurred by the person acquiring the building for property (or additions or improvements to property)." I.R.C. § 147(d)(3)(A).

[145] I.R.C. § 1400N(a)(5)(E) (2007).

[146] I.R.C. § 147(c)(1) (2008). There is an exception to this rule for "first-time farmers" and land acquired for environmental purposes. I.R.C. § 147(c)(2), (3).

[147] I.R.C. § 147(g). Examples of issuance costs include, but are not limited to underwriter's spread, counsel fees, financial advisor fees, rating agency fees, and trustee fees. Treas. Reg. § 1.150-1(b) (2007). Issuance costs do not include bond premium or letter of credit fees. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

[148] I.R.C. § 144(c)(6)(B) (2006). Historically, qualified private activity bonds have been subject to restrictions on the use of the proceeds to finance certain specified facilities, including a "facility used primarily for gambling." See I.R.C. § 147(e) (2002). Although this restriction applies to GO Zone bonds, the Act modifies the general rules applicable to qualified private activity bonds, including the limitation in I.R.C. § 144(c)(6)(B), which restricts the use of proceeds to finance a "facility used for gambling." Although these are virtually identical limitations, the GO Zone Act broadens the limitation by taking out the word "primarily."

to the lesser of 120% of the "average reasonably expected economic life" of the financed facility.[149] This is rarely a concern because commercial real property, residential rental property, and non-movable fixtures and equipment typically have longer economic lives.

(6) Any issuer of GO Zone bonds may adopt a "declaration of official intent" to issue the GO Zone bonds.[150] This "declaration of official intent" allows the use of GO Zone bond proceeds to reimburse a company for original expenditures made by such company during the period commencing sixty days prior to the date of the declaration of official intent by the issuer.[151] In addition, the public approval requirement of the Code is applicable to GO Zone bond issuances.[152] Thus, an elected official of Mississippi, Louisiana, or Alabama must approve the proposed issuance of GO Zone bonds following a public hearing and public notice regarding the users and nature of the facilities financed with GO Zone bond proceeds.[153]

(7) GO Zone bonds cannot be held by a person who is a substantial user of the project financed with GO Zone bond proceeds or by a related person of such a substantial user.[154] In addition, GO Zone bonds must not be deemed to be "federally guaranteed" within the meaning of the Code.[155]

(8) Lastly, the arbitrage limitations under Code Section 148 are applicable to all state and local bonds, and are thus applicable to GO Zone bonds. Generally, if GO Zone bond proceeds are invested at an interest rate producing a yield that is materially higher than the yield on the GO Zone bonds, the difference must be remitted to the United States government in

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[149] I.R.C. § 147(b). The "average reasonably expected economic life" of the financed facilities is determined as of the later of date in which the bonds are issued or the date the facility is placed in service. I.R.C. § 147(b)(3).

[150] Treas. Reg. § 1.150-2(e) (2007).

[151] *Id.*

[152] I.R.C. § 147(f) (2002). This is commonly referred to at the TEFRA hearing. *See also* MISS. CODE ANN. § 57-10-223(a) (2003).

[153] In Mississippi, the elected official can either be the governor or the treasurer. *See* MISS. CODE ANN. § 57-10-223(b) (2003); I.R.C. § 147(f)(2)(B).

[154] I.R.C. § 147(a) (2008). *See* Treas. Reg. § 1.103-11(b) (2007).

[155] I.R.C. § 149(b) (2008).

the form of a rebate payment.[156] Additionally, in order to even invest the GO Zone bond proceeds, to be expended on capital projects in such higher yielding investments, the issuer must comply with the provisions of a three-year temporary period exception.[157] Several exceptions to the rebate requirement are applicable to GO Zone bonds, including the special two-year construction expenditure exception, which is applicable if the spending of GO Zone bond proceeds meets the spending schedule required by the Code.[158]

B. Procedure for Obtaining GO Zone bonds

In Mississippi, the Mississippi Business Finance Corporation (MBFC) has been designated as the primary issuer of GO Zone bonds. MBFC is a public corporation of the state organized pursuant to Mississippi law, and serves as a statewide financing source which allows companies to consider financing and incentive alternatives through a single contact.[159] Although MBFC administers several financing programs, the tax-exempt Industrial Development Revenue Bond Program and the Small Enterprise Development Finance Program are typically the mechanisms used for issuing GO Zone bonds.

MBFC's Industrial Development Bond (IDB) Program is designed to create jobs and promote economic development in Mississippi.[160] Under the IDB Program, tax-exempt bonds may be loaned by MBFC to a qualified business for certain eligible projects. MBFC will derive funds for the IDB Program

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[156] Treas. Reg. § 1.148-3 (2008).

[157] Treas. Reg. § 1.148-1(e)(2) (2008). This is known as the general three-year temporary period for capital projects. *Id.* In order to qualify for the three-year temporary period, (1) the issuer must reasonably expect that at least eighty-five percent of the net sale proceeds of the issue will be allocated to expenditures on the capital projects by the end of the three-year temporary period; (2) there must be a "substantial binding obligation" to expend at least five percent of the net sale proceeds of the issue on the capital projects; and (3) completion of the capital project must proceed with due diligence. *Id.*

[158] I.R.C. § 1400N(a)(5)(F) (2007); *see also* I.R.C. § 148(f)(4)(C) (2006).

[159] MISS. CODE ANN. §57-10-167 (2003).

[160] MISS. CODE ANN. §57-10-203 (2003).

from the sale of its bonds on behalf of qualified projects.[161] In addition, under the Small Enterprise Development (SED) Finance Program, eligible "private companies" may borrow up to four million dollars from MBFC to finance capital projects.[162] The SED Program provides an opportunity for companies with smaller projects to obtain financing at tax-exempt interest rates. Commencing July 1, 2007, for companies located in the GO Zone, agricultural, aqua-cultural, horticultural, industrial, or research and development enterprises, or any commercial enterprise approved by MBFC (except such term shall not include any entity having a gaming license) can participate in the SED Program.

In order to obtain tax-exempt financing under Mississippi and federal law, companies must first obtain initial approval from MBFC. This initial process is called "inducement" and is MBFC's "declaration of official intent" under the Code.[163] Companies are also required to submit an application for a GO Zone allocation to the Mississippi Development Authority (MDA) in connection with the issuance of GO Zone bonds. In March of 2006, Governor Barbour approved the following process for disbursement of the allocations: for projects involving capital costs of $20 million or less, proceeds are allocated on a first-come first-serve basis, and the process is based on a limited review; for projects involving capital costs of $20 to $200 million,

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[161] Historically, through its tax-exempt IDB Program, only manufacturers and processors which met the definition of a "manufacturing facility" as set forth in Code Section 144(a)(12)(C) (2006) could benefit from the IDB Program. Following the passage of the GO Zone Act, the Mississippi legislature amended certain statutes involving the IDB Program to allow almost all commercial enterprises to participate in the tax-exempt IDB Program. MISS. CODE ANN. § 57-10-205 (2003). In addition, prior to the GO Zone Act, the maximum amount under the Code that could be financed using tax-exempt bonds for manufacturing facilities was $10 million. I.R.C. §144(a)(4) (2006). The maximum term of GO Zone bonds issued under the IDB Program is thirty years, or a lesser term if required by a letter of credit provider, MBFC, or applicable law. MISS. CODE ANN. § 57-10-235 (2003).

[162] MISS. CODE ANN. § 57-71-7,-11 (2003). Prior to the Mississippi legislature's amendment to the definition of "private company" under the Mississippi law, only manufacturers and processors which met the definition of a "manufacturing facility" as set forth in the Code qualified for financing under the SED program. *Id.*

[163] Inducement satisfies the "declaration of official intent" requirement under Treas. Reg. § 1.150-2 (2007). *See supra* note 151.

the process is analyzed on a case-by-case basis and is based on location, jobs, payroll, total investment, and the type of business. In addition, MDA may require a cost/benefit analysis on projects exceeding $50 million in volume cap allocation. For projects involving capital costs of over $200 million, the allocation may be limited to fifty percent of its total project financing. The maximum amount of the allocation for a particular project is $250 million in the six most southern Mississippi counties and $100 million in all other Mississippi GO Zone counties.

C. Application to Certain Businesses

Like the fifty percent bonus depreciation, GO Zone bonds work well for operating businesses such as manufacturing and warehousing facilities. If a business is eligible for both the fifty percent bonus depreciation and the GO Zone bonds, the threshold issue is determining which incentive the business should utilize. It would be advantageous for such a business eligible for both incentives to calculate the long term benefits resulting from each incentive, and then choose the incentive that is most beneficial to that particular business.

GO Zone bonds are also beneficial to investor-driven projects, including projects involving commercial rental real estate. GO Zone bonds are generally not a good fit for residential rental property, because federal law imposes low-income restrictions on these projects. However, numerous GO Zone bonds have been issued as qualified mortgage revenue bonds to finance single-family residential property in Mississippi.[164]

D. State and Local Incentives

In addition to the federal incentives available under the GO Zone Act, a business that uses either taxable or tax-exempt bonds may be able to achieve significant additional state-law incentives in connection with its financing. With a few

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[164] The Mississippi Home Corporation is the issuer of qualified mortgage revenue bonds in Mississippi.

exceptions,[165] a business must participate in a Mississippi bond program in order to qualify for the state and local incentives.[166] These incentives include a sales and use tax exemption for most purchases and the potential for the avoidance of the Mississippi contractor's tax. A business may also be able to obtain a property tax exemption for assets purchased with bond proceeds, if the local governing authority permits such an exemption. Companies may also be eligible for state income tax credits through the Rural Economic Development Assistance Program.

Mississippi sales and use tax is generally imposed at seven percent of the cost of tangible personal property.[167] Under the contractor's tax, a tax rate of three and one-half percent is generally imposed upon all amounts received by the general contractor under specified types of construction contracts in lieu of sales and use tax on component materials.[168] Purchases made by the project owner from the proceeds of certain state or local bond issues qualify for a sales/use tax exemption, but not a contractor's tax exemption.[169] The contractor's tax can, however, be reduced if the project owner, as opposed to the contractor, makes "direct" purchases of component materials and other items of personal property, thus utilizing the sales/use tax exemption which is available to the project owner and not the contractor. Consequently, in order for the owner to take advantage of the sales/use tax exemption, the property items eligible for such exemption must be removed from the construction contract so as to be considered purchased directly

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[165] *See infra* note 172. For example, businesses may qualify for an industrial exemption under Mississippi law. *See* MISS. CODE ANN. § 27-65-101 (2007).

[166] This includes the tax-exempt or taxable IRB Program or the SED Program.

[167] MISS. CODE ANN. § 27-65-17 (2006). The sales and use tax is only one and one-half percent for manufacturing machinery and equipment. *Id.*

[168] MISS. CODE ANN. § 27-65-21 (2007). Manufacturing machinery and equipment furnished by the contractor is still taxed at the special one and one-half percent rate if the contractor itself qualifies as a retailer with the State Tax Commission.

[169] MISS. CODE ANN. § 57-10-255(2) (2003). Qualification of each project must be pre-certified as qualified by the State Tax Commission. For the sales and use tax exemption, the owner must register with the Mississippi State Tax Commission for a use tax account number and also receive a direct pay permit number.

by the owner.[170]

Additionally, Mississippi law authorizes the granting of a property tax exemption, excluding taxes for school district purposes, for a project financed with taxable or tax-exempt bonds issued by the MBFC.[171] All property tax exemptions are discretionary with local taxing authorities (city and/or county governing authorities) and Mississippi law requires that the local tax authorities approve and consent to the property tax exemption. An ad valorem tax exemption is available for the maximum term of ten years.

Lastly, the Mississippi Rural Economic Development (MRED) Assistance Program is a program designed to enhance projects financed through one of the MBFC programs.[172] Through this program, eligible companies may receive income tax credits on Mississippi corporate income taxes.[173] Eligible companies include manufacturing facilities, certain warehouse or distribution centers, telecommunications and data processing centers and commercial enterprises that participate in the MBFC SED program.[174] Credits are computed on the company's annual debt service for the project financed through the MBFC IDB Program and cannot exceed eighty percent of the company's Mississippi income tax liability resulting from the project financed through the MBFC IDB Program.[175]

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[170] Basically, the contractor can do everything with respect to the purchase of such items that it would do if it were providing them under the construction contract with the exception of signing the owner's purchase orders and checks.

[171] MISS. CODE ANN. §57-10-255(2) (2003). In addition, the new enterprise/additions exemption and free port exempt is available for certain manufacturing and processing facilities. *See id.*

[172] MISS. CODE ANN. §57-10-401 (2003). MBFC has adopted guidelines to compute income tax credits for companies expanding projects in Mississippi. Under the formula set forth in the current MBFC guidelines, a company's income tax liability eligible for an income tax credit is computed based on an economic tax valuation percentage which takes into account increases in employment and increases in capital investment. However, MRED is a misnomer, since it is available throughout the state and not just rural areas. Projects must be approved by MBFC for participation in the MRED Program.

[173] MISS. CODE ANN. §27-7-22.3(2) (2007).

[174] MISS. CODE ANN. § 57-10-401.

[175] MISS. CODE ANN. §27-7-22.3(2) (2006).

VII. CONCLUSION

The GO Zone Act has been an integral part of the rebuilding of the Gulf Coast. Its scope is broader than just the coastal counties and parishes. For example, in Mississippi, forty-nine of the eighty-two counties are eligible for GO Zone benefits. These incentives, combined with state economic incentives, can help restore the region's business community more quickly, thereby supporting economic growth and recovery, as well as creating attractive opportunities for businesses to develop new facilities along the Gulf Coast. In summary, these economic incentives are so significant that any business considering an investment in any new, replacement, or expanded operations, buildings, or equipment within the GO Zone must consider employing these incentives to the fullest extent possible.

Depreciation Examples:

A. **Non-residential real property** (39 year-recovery period)

Hotels, office buildings, stores, warehouses, manufacturing plant buildings

Assumptions: basis of $10,000,000; place in service in June 2007

	With Bonus Depreciation	Without Bonus Depreciation
Year 1	$5,069,550	$139,100
Year 2	$128,200	$256,400

B. **Residential rental property** (27.5 year-recovery period)

Hotels, office buildings, stores, warehouses, manufacturing plant buildings

Assumptions: basis of $2,500,000; place in service in June 2007

	With Bonus Depreciation	Without Bonus Depreciation
Year 1	$1,274,625	$49,250
Year 2	$45,450	$90,900

Tax-Exempt "GO Zone bonds" Examples:

Project 1: Assumptions:
- $10 million financed
- 20-year term
- 200 basis points savings
- 5% (tax-exempt)
- 7% (taxable)

Total Savings: $2,768,237

Project 2: Assumptions:
- $10 million financed
- 20-year term
- 150 basis points savings
- 5.5% (tax-exempt)
- 7% (taxable)

Total Savings: $2,097,878

REPORT ON MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY DISASTER DEBRIS MANAGEMENT EFFORTS AFTER HURRICANE KATRINA

*Trudy Fisher**

Hurricane Katrina slammed into the Mississippi and Louisiana Gulf Coast on August 29, 2005, and moved up the eastern side of Mississippi leaving a path of unprecedented destruction. Many homes, businesses, and lives were destroyed that fateful day and for the past two years the staff of the Mississippi Department of Environmental Quality (MDEQ) has spent many hours working on various environmental issues related to the damage and effects of Hurricane Katrina. One of the biggest environmental challenges we have faced has been managing the enormous amount of debris caused by Hurricane Katrina. Approximately forty-six million cubic yards of debris was created in the State of Mississippi alone. Of this amount, over twenty-four million cubic yards was generated in the three Gulf Coast counties of Hancock, Harrison, and Jackson. Approximately seventy percent (or over seventeen million cubic yards) of the debris in these three coastal counties consisted of building and structural type wastes and the other thirty percent (or just over seven million cubic yards) consisted of trees, limbs, and other vegetative-type debris.

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* Executive Director of the Mississippi Department of Environmental Quality.

I. MDEQ'S INITIAL RESPONSES

To respond to the ensuing debris management issues, MDEQ initiated several response actions.

First, MDEQ stationed a team of engineers, scientists, and emergency responders on the coast to assist local governments, industries, businesses and organizations with monitoring and decision making on debris management issues. The MDEQ's South Regional Office located in Biloxi was not able to provide support after the storm since the facility was significantly damaged and several of the employees lost their homes. Each week a new response team would rotate to the coastal station and assume responsibilities for assistance and monitoring of debris management activities and sites. A daily conference call between MDEQ headquarters and the response team stationed on the coast was implemented to discuss and help address various decisions and issues related to debris management and other environmental conditions.

In addition, MDEQ initially stationed debris specialists from the agency at the headquarters of the Mississippi Emergency Management Agency. However, it quickly became evident that the disaster debris conditions required more resources. Consequently, MDEQ established a debris response station and call center at the MDEQ headquarters in Jackson. The call center was also staffed with MDEQ engineers, scientists, data management specialists and others to help with planning, decision making, public complaints and inquiries and networking with other state and federal agencies to assist the citizens of the state with debris management issues as well as other environmental and public health problems. MDEQ maintained a system to track the resolution of calls and attempted to resolve all questions or inquiries with callers that were within our environmental oversight. In addition, MDEQ often worked with local emergency management personnel, local solid waste management personnel, volunteer groups, the State Department of Health and local landfills and disposal contractors to assist citizens with other associated problems.

MDEQ also joined and participated in a Joint Debris Task Force of Federal and State Agencies to address the various

aspects of the disaster debris management conditions. The Debris Task Force led by the Federal Emergency Management Agency (FEMA) included representatives from MDEQ, the State Forestry Commission, the State Department of Agriculture and Commerce, the United States Environmental Protection Agency (U.S. EPA), the United States Army Corps of Engineers, the State Department of Archives and History, the United States Coast Guard and various other agencies. The Task Force met weekly and the various agencies discussed targeted debris management problems and worked together on a joint resolution of those problems.

II. MDEQ Addresses Problem Wastes and Debris Management

Perhaps one of the most daunting tasks that Mississippi faced after the storm was what to do with the massive amount of disaster debris. But first, MDEQ had to address wastes that had been released into the environment that would create the most pressing environmental and public health concerns. MDEQ worked with the U.S. EPA to assess facilities and communities across the Gulf Coast for release of hazardous constituents. State and federal representatives visited various industrial and commercial facilities to assess potential hazardous releases to the environment. The state was fortunate that these assessments did not reveal widespread release of hazardous materials. Those releases that could be identified were contained and addressed. Smaller quantities of hazardous materials from damaged households and businesses would be dealt with by ongoing identification and segregation of the material from the normal debris collection and management activities. Another problem waste that MDEQ had to address early after the storm was varying amounts of sewage that were released from lift stations that lost power throughout many of the coastal cities. These failing lift stations dumped sewage into ditches, streets and even homes in some instances. MDEQ worked with cities across the Gulf Coast to distribute lime and other appropriate chemicals to counter the pathogenic content of the sewage. In addition, MDEQ worked with city public works

officials to restore wastewater treatment services in a prompt fashion to coastal communities. An additional problem waste that implicated public health concerns was the tremendous amount of food wastes including poultry, bananas and pork belly products at the port in Gulfport and fish and other seafood products at the Pascagoula Port and at seafood industries sites along the Gulf Coast. Most of these materials had to be collected and landfilled quickly to prevent public health problems from the rotting foods. In a few instances the bulk food wastes were of such significant concern that MDEQ worked with the EPA to dispose of the materials under the hazardous material management provisions. MDEQ also had to deal with a number of grocery and convenience stores along the coast that had suffered electricity outages and in some instances that were flooded, leaving rotting and decaying food in the stores. MDEQ worked with store owners to develop plans for cleanout and disposal of these food products to prevent these materials from creating public health concerns.

In addition to these actions on the problem wastes streams, MDEQ had to address the large amount of debris from homes, commercial buildings and other structures. Immediately after the storm, MDEQ conducted an evaluation of the recycling capabilities and of the existing landfill capacity on the Gulf Coast to determine what additional disposal capacity the three coastal counties might need in order to dispose of the hurricane debris. This evaluation indicated that recycling of much of the disaster debris would be difficult given that the materials were mixed together and in some instances contaminated or damaged beyond recovery. Consequently landfill disposal would likely be the most practical solution to the largest volume of the debris. The evaluation also indicated that there was a significant shortfall in needed landfill disposal capacity and that MDEQ in coordination with the local governments would likely need to consider new emergency landfill sites for the debris as well as other management options. The emergency landfill sites, upon approval, would only operate temporarily until the debris clean up could be completed. MDEQ also was concerned that the communities should preserve some available landfill capacity for

the future needs of the counties as large volumes of wastes would also be generated in rebuilding our Gulf Coast. Consequently, MDEQ worked with local governments in the three coastal counties in approving the thirteen temporary emergency disposal sites in addition to six permitted landfill sites that existed prior to the hurricane.

MDEQ also worked with local governments, the Corps of Engineers and with other debris contractors to develop sites for staging and temporary storage of wastes to segregate the various types of the debris for proper management. At these sites, vegetative debris, white goods, electronics, hazardous materials and other materials would be segregated for management at the proper disposal or recycling site. This type of segregation was also done at the landfill sites. Sites were developed with the U.S. EPA to manage and temporarily store the hazardous materials that would be pulled from the debris piles and segregated for proper management or that would be collected from residents or hazardous material clean up actions. In some areas, the U.S. EPA was able to offer curbside collection of household hazardous materials. Over the course of the debris clean up, sites would also be established for white goods recycling, staging damaged boats and automobiles, crushing concrete, staging debris removed from state waters and various other types of debris management sites.

MDEQ also worked with local governments and other state and federal agencies to set up various other types of debris management sites. Sites were developed for reducing the tremendous volume of vegetative debris including downed trees, stumps, large limbs and other similar wastes. These sites involved mulching and burning the vegetative wastes to reduce the volume of materials. Conditions were developed for locating burn sites that included various set back distances and other stipulations on where such sites could be established to avoid problems and nuisances for local citizens. MDEQ developed an ash use policy that would allow burn sites to (upon appropriate sampling) propose beneficial use of the debris ash as a soil conditioner. In addition, MDEQ worked with the U.S. Army Corps of Engineers to promote use of the millions of cubic yards

of mulch created. Mulch was reused as boiler fuel in some instances, mulch for blueberry farms, landscape materials around municipal and county properties, golf courses, schools and other sites. Mulch was even used in some of the live oak recovery efforts along the Gulf Coast to help the valued live oaks recover from the surge and wind damage of Hurricane Katrina. Despite finding these varied uses for the mulch, the volume of materials was so great that MDEQ had to create additional disposal sites in some communities strictly for mulch materials for which we could find no market or end use. These problems become more urgent when several of these large mulch piles in the southern part of the state began to spontaneously combust. MDEQ worked with the U.S. Army Corps of Engineers at that time to evaluate and approve emergency disposal sites to move the mulch for final disposal.

Overall, some 340 temporary sites were approved for handling the wastes generated by Katrina. In addition, numerous permanent solid waste landfills, transfer stations, and other solid waste facilities were used for the management of hurricane debris. Of the 340 sites, more than 250 were chip or burn sites for vegetative wastes only, approximately thirty sites were approved for staging wastes, and approximately eighty sites were approved as burial sites. On the coast, the thirteen temporary emergency landfill sites and the six permitted disposal sites received the bulk of the seventeen million cubic yards of building and structural debris (along with six permitted disposal sites). The other burial sites were used primarily for the disposal of vegetative debris which could not be recycled.

III. MDEQ Emergency Debris Site Evaluation and Operating Procedures

MDEQ recognized, in developing the temporary emergency landfill sites, that protection of our state's groundwater and surface water resources was paramount, especially in the midst of our nation's worst disaster. Consequently, MDEQ implemented a number of policies and actions in the management of the hurricane debris to ensure that the disposal of this tremendous amount of debris would not create long term

environmental problems for the area. As stated, MDEQ worked with local governments in the three coastal counties to approve thirteen temporary emergency disposal sites in addition to six permitted landfill sites that existed prior to the hurricane. These existing landfill sites all had gone through an extensive environmental review in the process of obtaining a permit to ensure that the locations where these landfills were constructed were geologically suitable with underlying low permeable clays to protect groundwater resources in the area of disposal. In addition, MDEQ also evaluated each of the thirteen sites used for the temporary emergency landfills to determine if the underlying geological and groundwater conditions at the sites were suitable for debris disposal. Sites that did not have suitable underlying clay soils or where groundwater was unacceptably close to the surface were not approved for disposal of the hurricane debris. MDEQ also evaluated these sites for other environmental concerns including wetlands protection, protection of nearby surface waters such as rivers, streams or bayous, proximity to residences and other types of structures, and proximity to the debris to attempt to minimize the distances that wastes would need to be transported.

In addition to the environmental siting review conducted on each site, MDEQ also required that the sites be operated in a manner that was protective of the environment and that prevented public nuisances and other problems. Debris sites were required to receive proper compaction, a periodic earthen cover and a final earthen cover upon closure. MDEQ maintained a daily presence at these emergency landfill sites during the clean up activities following the hurricane to ensure that the sites were being operated in a proper manner that was protective of our state's natural resources. Another primary operational concern for these sites was that materials that contain chemicals or toxics would be removed from the debris prior to ultimate disposal. Consequently, there were often several points in the debris management at which these potentially hazardous wastes in the debris were segregated and disposed of in a different manner. Household hazardous waste items and similar items from commercial businesses were

segregated from the debris at the point of initial collection, in some instances at a specific staging or segregation site, and then finally again at the actual disposal sites. Smaller items such as household chemicals and cleaners, solvents, paints, petroleum products and various other materials were removed from the wastes to the extent possible and segregated for management by the U.S. EPA in the hazardous materials program.

Larger household items such as large appliances, lawn mowers, computers, televisions and other similar items were also segregated and removed because these items also contain chemicals, refrigerant, heavy metals and petroleum products. In addition, these bulky items would make proper compaction at the landfills difficult to achieve. Proper compaction is important at these landfills because it helps to prevent the infiltration of rainwater into the landfill and helps to reduce the contaminated leachate within the landfill. It also helps to reduce the potential for combustion within the landfill. The materials separated out were recycled where possible. The segregated debris which could not be recycled was sent to municipal solid waste landfills with constructed liner systems for disposal.

Perhaps the greatest success in recycling was with white goods and other similar metals. In the three coast counties, information given to MDEQ indicates that more than 24,000 tons of metal was collected, baled, and recycled at white goods collection sites. If we assumed an average of approximately one hundred pounds per unit, it is estimated that over 450,000 refrigerators, freezers, washers, dryers and hot water heater units were recycled. Efforts were made to extract the refrigerant from each refrigerator and freezer unit prior to baling. Approximately 1,500 pounds of refrigerant was salvaged and recycled. A smaller amount of aluminum and iron was recycled as well. Mississippi had less success in recycling electronics products due to the damage and salt water inundation to many of the units that were collected. However, there were some sponsored events on the coast to recover damaged electronic materials. The U.S. EPA and the Best Buy Retail Chain teamed up with MDEQ and Jackson County to sponsor a collection event in that county for damaged

electronics.

IV. Ensuring Proper Site Closure

In addition to the considerations in approving and operating these emergency sites, MDEQ has also worked with FEMA to ensure proper closure of disposal sites, mulch sites, burn sites and staging sites. As of August 31, 2007, MDEQ believes that most of the 340 emergency debris management sites have been closed, including 250 or more mulch and burn sites as well as the thirty staging sites. With FEMA's assistance, MDEQ installed groundwater monitoring systems at each of the thirteen emergency disposal sites and at the six permitted existing disposal sites that took the Katrina debris. These monitoring systems consisting of wells constructed around the perimeter of each landfill will help MDEQ detect potential groundwater contamination before it becomes a problem for drinking water sources. MDEQ has conducted one monitoring event at each site and is planning to conduct additional groundwater monitoring events.

Approximately ten percent of the sites have various issues that have prevented the sites from being considered as properly closed. These conditions vary but they include sites where debris has not been properly removed or processed, sites where ash and other residuals have been left in an apparently unacceptable condition, and other sites where authorized debris management activities were not initiated or properly completed for various reasons. MDEQ is in the process of working with MEMA to assure proper closure of the remaining debris sites and to resolve the remaining environmental issues at the sites so that the State of Mississippi can move forward with completion of Katrina-related debris management issues. The scope of the work entails reviewing and assessing the conditions at each site, determining the proper course of action to remedy site conditions, identifying the persons responsible for conducting remedial actions, and then moving forward with these actions to complete the closure process.

MDEQ is also working on an evaluation and revision of the Emergency Debris Management policies implemented after

Katrina. The revised policies will be compiled into a Debris Management Plan that will assist MDEQ, other state and federal agencies, local governments, emergency management responders, and emergency management debris contractors in their preparation for the next disaster event that could occur in Mississippi. In summary, MDEQ believes that the debris management activities in Mississippi have been conducted in a manner that will ensure protection of the environment for generations to come.

IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON INTERNALLY DISPLACED GULF COAST CITIZENS

John S. Williams and Kristy Bennett***

I. INTRODUCTION

On Thursday, June 28, 2007, Michel Martin, journalist and NPR host of the program 'Tell Me More,' was a panelist for the Third Democratic Primary Presidential debate which took place at Howard University in Washington, D.C., and was televised on PBS. Ms. Martin's one question of the candidates was, "Would you support a federal law guaranteeing the right to return to New Orleans and other Gulf regions devastated by Hurricane Katrina, based on the United Nations human rights standards governing the internal displacement of citizens?"[1] Ms. Martin's question was definitely timely. Unfortunately, not one of the eight democratic hopefuls came close to answering or even addressing the question.

Hurricane Katrina and its aftermath have slipped from the national consciousness relative to the harrowing days following Hurricane Katrina's landfall on the Gulf Coast. But, for the

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[1] *Democratic Candidates Debate, All-American Presidential Forums on PBS* (PBS broadcast June 28, 2007).

citizens living on the Gulf Coast, the realities of life after Katrina are inescapable. Gulf Coast citizens have grappled with housing issues, health care issues, law enforcement issues, access to public services issues, and many other inescapable problems. Gulf Coast citizens have utilized many venues in order to simply survive but also to seek redress for the loss of life, limb, and property as a result of Hurricane Katrina. Gulf Coast residents continue to be deprived of basic civil and human rights.

Professor Cornel West stated, "[p]eople were quick to call them [Hurricane Katrina victims] refugees because they looked like they were from another country. They are. Exiles in America. Their humanity had been rendered invisible."[2] Unfortunately, after Hurricane Katrina the Gulf Coast resembled a third world country; but counter to Professor West's assertion, Gulf Coast residents retained certain inalienable human rights. This paper will focus on the impact of international human rights law on Gulf Coast residents post-Hurricane Katrina. Specifically, it will discuss international treaties and resolutions that confer specific rights to Gulf Coast residents. It will also discuss how these rights have not been observed by state, federal, and local actors post-Hurricane Katrina. Finally, this paper will address specific instances where the human rights standards outlined in international law were violated by our federal and state governments.

II. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAWS TO CONDITIONS ON THE GULF COAST

Human rights are rights that people have by reason of the fact that they are human beings. They are international ethical standards that uphold, as a birthright, the minimum threshold individuals and communities everywhere require to live in dignity and to realize their potentials. Human rights are not based on status, or dependent on recognition by an external authority. Nor are they granted for good behavior that can be

[2] Hermene D. Hartman, *Professor West on New Orleans*, N'DIGO (Chicago), Sept. 22-28, 2005, at 3.

taken away if the beneficiary engaged in bad conduct. These standards confer responsibility on all governments to respect, protect, and help realize people's human rights, as well as form the basis for evaluation of these governments both domestically and internationally.[3]

Although human rights are the primary responsibility of governments, individuals have the obligation to monitor and put pressure on governments to protect and fulfill those rights.

Much has been documented about the federal response, or the lack thereof, after Hurricane Katrina. Citizens on the Gulf Coast were at a ground zero of destruction and mayhem. Citizens are entitled to certain basic services from federal and state governments when a human disaster ensues. Citizens are entitled to further protections from the federal and state governments as a result of treaties and other recognized agreements between countries in the United Nations. Three such agreements are: the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Guiding Principles on Internal Displacement.

A. Applicability of Treaties and International Law

International law is an incorporation of the fundamental concepts of the law of the sovereign nations.[4] It is a product of the substantive law and legal processes and procedures that define the relationship between these nations. Traditionally, matters involving the human rights of persons in their own country were not a matter of international concern, but an issue of domestic policy.[5] After the global emergence of extraordinary violations of human dignity and welfare, nations increasingly adopted a general sense of social responsibility for the treatment of persons in other countries and territories.[6]

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[3] Phillip C. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417 (2006).

[4] Cornell Legal Information Institute, http://www.law.cornell.edu/wex/index.php/international_law (last visited July 5, 2007).

[5] LINDA A. MALONE, INTERNATIONAL LAW 2 (2d ed.1998).

[6] *Id.* The modern concept of international human rights law emerged as a result of

Treaties articulate specific human rights. Treaties are legally binding once they are ratified by governments.[7] Each treaty has an oversight body called a treaty committee which is a subcomponent of the United Nations General Assembly.[8] In addition to the core human rights treaties, there are many other universal instruments relating to human rights. Declarations, principles, guidelines, standard rules, and recommendations are not binding legally.[9] However, these instruments have an inextricable moral force and provide guidance to governments in their conduct. Covenants, statutes, protocols, and conventions are legally binding for those states that ratify or accede to them.[10]

One such document is the Guiding Principles on Internal Displacement.[11] The Guiding Principles outline the responsibilities of governments and other actors toward those who have been displaced by natural disaster or armed conflict.[12] Although not legally binding as such, they reflect the moral and political obligations of the adopting states to provide for the basic needs of displaced persons as well as to protect their rights of compensation, participation, and return.[13] The Guiding Principles draw directly from standards common to international human rights and humanitarian law.[14]

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the world's reaction to Nazi atrocities during World War II. This had a major role in inspiring the United Nations in 1945, having as one of its principle purposes the promotion and protection of human rights. U.N. Charter art. 1, para. 2; art. 3.

[7] MALONE, *supra* note 5, at 2.

[8] *Id.*

[9] Office of the United Nations High Comm'r for Human Rights, Int'l Law, http://www.ochr.org/english/law/index.htm (last visited Aug. 5, 2007).

[10] *Id.*

[11] *Report of the the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission on Human Rights, Mass Exoduses and Displaced Persons, Addendum, Guiding Principles on Internal Displacement*, U.N. ESCOR, Comm'n on Human Rights, 54th Sess. Agenda Item 9(d), ¶ 9, U.N. Doc. E/CN.4/1998/53/Add.2 (1998) [hereinafter *Guiding Principles*], *available at* http://www.unhchr.ch/html/menu2/7/b/principles.htm (last visited Aug. 5, 2007).

[12] *Id.*

[13] *Id.*

[14] Cynthia Diane Stephens & Jerome Reide, *Katrina "Survivors" versus "Internally*

B. International Covenant on Civil and Political Rights

International human rights instruments recognize and "guarantee" three categories of human rights: "civil and political rights, socioeconomic rights, . . . and the rights of peoples or [collective rights]."[15] Political-civil rights include, among others, the right to life, liberty, and freedom of movement; rights to freedom of thought, conscience, and religion; freedom of expression and the press, peaceful assembly, and association; and freedom from discrimination.[16]

The instrument that elaborates many of these rights is the International Covenant on Civil and Political Rights (ICCPR).

On September 8, 1992, the United States Senate ratified the ICCPR.[17] "The ICCPR is a legally binding treaty, and the signatory countries are obligated to implement its provisions.[18] Each signatory country agreed to adopt legislation within its jurisdiction that would give effect to the rights listed in the ICCPR."[19] The ICCPR is comprised of fifty-three articles and protects a myriad of civil and political rights. Many of the rights granted by the ICCPR mirror the rights that United States citizens and Mississippians are guaranteed by the United States and Mississippi Constitutions. However, international human rights law grants more extensive protections primarily because the rights are based solely on an individual's humanity as opposed to other debatable classifications.[20]

The ICCPR provides that "[a]ll peoples have the right [to] freely determine their political status and freely pursue their

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Displaced Persons" More than Semantics, 33 FALL HUM. RTS. 2 (2007).

[15] Aka, *supra* note 3, at 423.

[16] *Id.*

[17] Brian L. Porto, *Construction and Application of International Covenant on Civil and Political Rights*, 11 A.L.R. FED. 2d 751 (2006).

[18] *Id.*

[19] *Id.*

[20] Aka, *supra* note 3, at 417. Classifications of protected classes pursuant to the Fourteenth Amendment jurisprudence are constantly debated, reviewed, and occasionally rebuked, therefore limiting the rights afforded to certain individuals. Rights protected by international human rights law are less alienable than rights embodied in the state and federal constitutions.

economic, social and cultural development."[21] The ICCPR reaffirms the equal right of men and women to the enjoyment of all human rights and enjoins states to make that principle a reality.[22] The ICCPR protects the right to life[23] and states that no one is to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment;[24] that no one is to be subjected to arbitrary arrest or detention;[25] and that all persons deprived of their liberty are to be treated with humanity.[26] The Covenant provides for freedom of movement and freedom to choose a residence,[27] and it makes provisions for the equality of all persons before the courts and tribunals and for guarantees in criminal and civil proceedings.[28]

The ICCPR provides for protection of the rights to freedom of thought, conscience, and religion[29] and freedom of opinion and expression.[30] It recognizes the right of peaceful assembly[31] and the right to freedom of association.[32] It also recognizes the right of men and women of marriageable age to marry and found a family, and the principle of equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.[33] It lays down measures to protect the rights of children,[34] and recognizes the right of every citizen to take part in the conduct of public affairs, to vote and to be elected, and to have access, on general terms of equality, to public

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[21] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1, Dec. 16, 1996 (entered Mar. 23, 1976), *available at* http://www.ohchr.org/english/law/ccpr.htm.

[22] *Id.* at art. 3.

[23] *Id.* at art. 6.

[24] *Id.* at art. 7.

[25] *Id.* at art. 9.

[26] *Id.* at art. 10.

[27] *Id.* at art. 12.

[28] *Id.* at art. 14.

[29] *Id.* at art. 18.

[30] *Id.* at art. 19.

[31] *Id.* at art. 21.

[32] *Id.* at art. 22.

[33] *Id.* at art. 23.

[34] *Id.* at art. 24.

service in his or her country.[35] It also calls for protection of the rights of ethnic, religious, and linguistic minorities in the territories of states parties.[36] Article 28 of the ICCPR provides for the establishment of a Human Rights Committee responsible for supervising implementation of the rights set out in the Covenant.[37]

C. The International Convention on the Elimination of All Forms of Racial Discrimination

On October 21, 1994, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was ratified by the United States Senate.[38] ICERD is based on the United Nations' disdain for all forms of discrimination and its appreciation of the dignity and equality inherent in all human beings. ICERD defines the term "racial discrimination" as

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life . . .[39]

ICERD contains twenty-five articles but only the first eight address actual rights conferred by the Convention.[40] ICERD condemns any type of discrimination and gives the state an affirmative obligation not to engage in any type of discrimination.[41] The relevant portions of the Convention require that member states undertake to prohibit and eliminate

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[35] *Id.* at art. 25.

[36] *Id.* at art. 27.

[37] *Id.* at art. 28.

[38] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Dec. 21, 1965 (entered Jan. 4, 1969), *available at* http://www.ohchr.org/english/law/cerd.htm.

[39] *Id.* at art. 1. ICERD also states that the Convention shall not apply to distinctions, exclusions, or preferences made based on citizenship. *Id.*

[40] *Id.*

[41] *Id.*

racial discrimination in all its forms.[42] Specifically, ICERD provides the right to equal treatment before tribunals and other justice administering entities, the right to security of person and protection by the state against violence or bodily harm, the right to participate in government and the electoral process, the right to housing, the right to education and training, and the right to medical care, social security, and social services.[43]

D. Guiding Principles on Internal Displacement

In 1992, at the request of the Commission on Human Rights, the Secretary-General of the United Nations appointed a representative on internally displaced persons to study the causes and consequences of internal displacement, the status of the internally displaced in international law, the extent of the coverage accorded them within existing international institutional arrangements, and ways in which their protection and assistance could be improved.[44] Dr. Francis Deng, of Sudan, was asked to prepare a normative framework of the rights of internally displaced persons. In 1998, Dr. Deng submitted the Guiding Principles on Internal Displacement to the United Nations Commission on Human Rights.[45]

As stated earlier, the Guiding Principles do not constitute a treaty and therefore are not binding on the United States. However, the Guiding Principles "reflect and are consistent with international human rights law and international humanitarian law," which is embodied in other treaties that are binding upon the United States as a result of ratification.[46] On December 22, 2003, the United Nations General Assembly adopted a resolution recalling the relevant norms of international human rights law and international refugee law and recognized "that the protection of internally displaced persons has been

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[42] *Id.*

[43] *Id.* at art. 5.

[44] Fredric Kirgis, *Hurricane Katrina and Internally Displaced Persons*, Am. Soc'y of Int'l Law, ASIL Insight (Sept. 21, 2005) *available at* http://asil.org/insights/2005/09/insights050921.html (last visited Nov. 15, 2007).

[45] *Id.*

[46] *Id.*

strengthened by identifying, reaffirming and consolidating specific standards for their protection, in particular through the Guiding Principles on Internal Displacement."[47]

The Guiding Principles cover three different phases of internal displacement: protection against displacement, protection during displacement, and protection after the displacement is over.[48] As was the case with the previously discussed treaties, the responsibility for protecting and assisting the displaced lies with the national authority or government entity.[49] The Guiding Principles provide that every human being shall have the right to be protected against being arbitrarily displaced from his or her place of habitual residence.[50] Also, displacement should not last longer than required by the circumstances.[51] The Guiding Principles require that a state party take adequate measures to guarantee that displaced persons have full information on the reasons and procedure for their displacement and also compensation and relocation.[52]

The Guiding Principles provide that displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty, and security of those affected.[53] The Guiding Principles provide a right to an adequate standard of living including essential food, potable water, basic shelter and housing, appropriate clothing, and essential medical services and sanitation.[54] Internally displaced people have a right to an education and training facilities as soon as conditions permit. Most importantly, internally displaced people have a right to return home whenever practicable.[55]

The Guiding Principles on Internal Displacement provide a

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[47] *Id.*

[48] *Guiding Principles*, *supra* note 11.

[49] *Id.* at principle 3.

[50] *Id.* at principle 6.

[51] *Id.*

[52] *Id.* at principle 7.

[53] *Id.*

[54] *Id.* at principle 18.

[55] *Id.* at principle 23.

specific framework within which the treatment of the Gulf Coast residents impacted by Hurricane Katrina can be analyzed to determine if they have been treated in a manner consistent with universal human rights standards. Gulf Coast residents, for the most part, fled no farther than neighboring states, if they fled their home state at all. The label of internally displaced person could be applied to thousands of residents on the Gulf Coast. While all persons are deserving of equal and fair treatment, the Guiding Principles on Internal Displacement were created to provide direction and guidance to any sovereign nation or other authority faced with dealing with displaced persons.

III. HUMAN RIGHTS CONCERNS POST-HURRICANE KATRINA

The problems created by Katrina are still rampant two years after the destruction took place. Many of the programs aimed at helping rebuild have failed to make an impact. President Bush's September 2005 promise to "do what it takes, [to] stay as long as it takes, to help citizens to rebuild their communities and their lives," has gone unfulfilled.[56] Gulf Coast leaders expect the President and other federal leaders to step up their commitment to rebuilding.[57] "[T]wo years after the disaster, schools and hospitals across the Gulf Coast are still shuttered, miles of houses and infrastructure are still in shambles, and tens of thousands of people displaced by Katrina are still living in chaos."[58] Without any type of plan for seeing to the basic needs of those displaced by Katrina, the government has failed in its duty to protect Gulf Coast residents' basic human rights, demoralizing them and leaving them with little hope.

To date, the rights of the displaced persons on the Mississippi Gulf Coast are still being ignored. One of the most

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[56] George W. Bush, President of the United States, Address before the Nation on Recovery from Katrina (Sept. 15, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html.

[57] Chris Kromm & Sue Sturgis, *Blueprint for Gulf Renewal: The Katrina Crisis and a Community Agenda for Action*, S. EXPOSURE (Inst. for S. Studies, Durham, N.C.), Aug./Sept. 2007, at 4-5.

[58] *Id.* at 4.

serious deprivations of rights continuing to date is the lack of affordable housing on the Coast. One of the two largest sources of funding to assist those who were displaced by the Category 4 hurricane is from Community Development Block Grants.[59] The lawmakers in Washington set aside $16.7 billion to go towards rebuilding, especially housing, in the areas affected by Hurricanes Katrina and Rita.[60] Yet in March 2007, only one billion dollars had been spent, accounting for just six percent of the available funds.[61] This resulted in a great deal of bad publicity for the Department of Housing and Urban Development, causing a flurry of activity over the next four months, so that by July 2007, another $3.8 billion had been spent.[62] However, of the total funds allocated for the states affected by Hurricanes Katrina and Rita, over seventy percent of the money remains unspent.[63]

The other major source of funding for the rebuilding efforts for the impacted areas was supposed to be the Federal Emergency Management Agency's (FEMA) Public Assistance Program.[64] Yet only $3.4 billion of the $8.2 billion was allocated for long term rebuilding efforts, such as repairing schools and hospitals.[65] The remainder of the money allocated by FEMA was earmarked for emergency efforts, such as waste and debris removal.[66] The $3.4 billion allocated for rebuilding the public infrastructure is spread over five states affected by the 2005 hurricanes: Alabama, Florida, Louisiana, Mississippi, and Texas. Due to FEMA projections which have greatly misjudged the amounts necessary to make any real improvements in the

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[59] *Id.* at 8.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Letter from Peter R. Orszag, Dir., Cong. Budget Office, to Hon. John M. Spratt, Jr., Chairman, H. Comm. on the Budget (Aug. 1, 2007) (on file with the Cong. Budget Office), *available at* http://cbo.gov/ftpdocs/85xx/doc8514/08-07-Hurricanes_Letter.pdf

[64] Kromm & Sturgis, *supra* note 57, at 8.

[65] *Gulf Coast Rebuilding: Observations on Federal Financial Implications, Before the H. Comm. on the Budget*, 110th Cong. 5 (2007) (statement of Stanley J. Czerwinski, Dir., Strategic Issues, GAO).

[66] *Id.*

aforementioned states, the allocated money would not even cover what it will take to rebuild just an eighth of Louisiana's damaged infrastructure alone.[67] Unfortunately, the shortfall is not readily identifiable due to the hold-ups in spending the funding.

The Stafford Act governing the disbursement of FEMA aid money includes a matching provision whereby local governments pay a percentage of rebuilding projects up front before receiving federal aid. In an effort to alleviate some of the burden placed on local governments that have lost most of their infrastructure, including their tax base and other sources of income, Congress has agreed to reduce the matching requirement from twenty-five percent to ten percent post-Katrina.[68] Unfortunately, this still puts an undue burden on these already cash-strapped areas and is less than the complete waiver of this matching requirement that was afforded to New York after September 11, 2001, and Florida after Hurricane Andrew.[69] The matching requirement has grounded efforts in Hancock County, Mississippi, because of the county's inability to come up with the necessary funds prior to receiving the FEMA aid.[70]

This conduct violates many of the tenets of both the ICCPR and ICERD. The right to housing is a fundamental human right. Gulf Coast residents were forced to leave their homes for their safety, but two years later there are still Gulf Coast residents who do not have adequate housing in direct violation of ICERD and ICCPR.

What is evident is that the local governments do not have the wherewithal of the federal government to oversee the rebuilding efforts that flow from this horrendous natural disaster. It is precisely this type of situation that is contemplated by the Guiding Principles for Internal Displacement. Principle 3 specifically states that "[n]ational authorities have the primary duty and responsibility to provide

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[67] Kromm & Sturgis, *supra* note 57, at 8.

[68] *Id.*

[69] *Id.*

[70] *Id.*

protection and humanitarian assistance to internally displaced persons within their jurisdiction."[71] It is obvious that the federal government has the authority to do away with much of the bureaucratic red tape that holds up much of the disbursement of funding to those who need it most—those displaced from their homes who are unable to return because of the lack of funds to rebuild or repair what was once theirs. The money is simply not making it to those who desire to return to their homes but who simply cannot afford to.

The failure of the federal government to assist those being displaced due to lack of funding of money that has already been appropriated by the government to help citizens return home is directly in contradiction to several Guiding Principles. Principle 5 dictates that authorities and international actors respect the obligations imposed by international law, including human rights law and humanitarian law, so as to prevent and avoid conditions leading to displacement of persons. Principle 6 calls for protection from arbitrary displacement from a person's home or place of habitual residence, including displacement as a result of natural disaster except when to remain would endanger the safety and welfare of those being affected. However, displacement should never last longer than necessary under the circumstances. In the case of those still displaced on the Mississippi Gulf Coast, much of the problem results from a lack of funding, and more importantly, a lack of affordable housing alternatives.

Immediately after Katrina, most coastal residents had lost their homes or they were badly damaged. With nowhere to go, many ended up in wrecked homes or moved in with friends and relatives.[72] In Biloxi, Mississippi, the thirty-foot storm surge from Katrina resulted in the destruction of some 3,500 homes—approximately sixty percent of the city's housing.[73] Despite the provisions of the Guiding Principles relating to the right of displaced persons to an adequate standard of living,[74] many of

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[71] *Guiding Principles*, *supra* note 11, at principle 3.

[72] Kromm & Sturgis, *supra* note 57, at 13.

[73] Jim Lewis, *Battle for Biloxi*, N.Y. TIMES MAG., May 21, 2006, at 13.

[74] *Guiding Principles*, *supra* note 11, at principle 18.

those displaced by Katrina still live in substandard housing. While citizens may have been able to move out of wrecked homes when FEMA provided its trailers in the winter following Katrina, FEMA's unstable housing solution has posed more problems for Katrina's displaced persons.

FEMA purchased 102,000 travel trailers to serve as temporary housing to residents displaced by Katrina at an estimated cost of $2.6 billion.[75] Within months, trailer residents began complaining of various health problems, including breathing difficulties, irritated eyes, hacking coughs, headaches, and nausea.[76] When the federal government refused to test the trailers, purportedly based on advice from their legal counsel that testing of trailers could make FEMA legally liable if health problems cropped up,[77] the Sierra Club stepped in and began testing trailers in Mississippi in April 2006.[78] The testing revealed that ninety-four percent of the thirty-one trailers tested had formaldehyde levels that exceeded exposure limits set by the Federal Occupational Safety and Health Administration.[79] The Sierra Club findings and the Waxman hearings, which exposed FEMA's express failure to protect against unwarranted exposure to health risks associated with the trailers they spent billions of dollars on, exemplifies yet another failure of the federal government to adhere to the basic Guiding Principles requiring that "[a]t a minimum, regardless of the circumstances," internally displaced persons be provided with and ensured safe access to basic shelter and housing and essential medical services and sanitation.[80] FEMA's initial response to the formaldehyde exposure was to advise citizens to

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[75] Kromm & Sturgis, *supra* note 57, at 33.

[76] *Id.*

[77] *FEMA's Toxic Trailers: Hearing Before H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) (statement of Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform).

[78] Kromm & Sturgis, *supra* note 57, at 33.

[79] Sierra Club, *Toxic Trailers? Tests Reveal High Formaldehyde Levels in FEMA Trailers*, http://www.sierraclub.org/gulfcoast/downloads/formaldehyde_test.pdf (last visited Aug. 5, 2007).

[80] *Guiding Principles*, *supra* note 11, at principle 18(2)(b), (c).

simply open a window.[81]

Not until lawsuits were filed against it did FEMA respond fully by initiating the Center for Disease Control to conduct its own assessment of the trailers and suspend its distribution and sales of the trailers.[82] FEMA also offered to try to find other housing solutions, but it has yet to offer any rental assistance, or better yet, do as some organizations that have been actively involved in the recovery on the Coast recommend, stop funding trailers and give the money directly to the people.[83]

In addition to the problems posed by the trailers, rental property prices have more than doubled on the Coast with no government oversight. Many people continue to work for the same wages that they earned pre-Katrina and cannot afford post-Katrina apartment prices.[84] As a result, over forty multi-ethnic advocacy, social service, and faith-based organizations have formed the Steps Coalition to promote a just recovery in South Mississippi.[85] The Steps Coalition focuses on issues such as fair housing and environmental concerns, human rights, and economic fairness.[86] The members of the coalition felt that by aligning themselves they could better influence policy as one voice to be heard by those in power.

In addition to the housing concerns, there is a shortage of adequate health care on the Coast. While free clinics have been formed to assist in treating those unable to afford medical care, there has recently emerged a push to close the free clinics by the for-profit providers who feel that their business is being harmed by the clinics.[87] These free clinics have been essential to those who have yet to see the federal funding so touted by the President and those in Washington. The clinics are one example of compliance with the Guiding Principles' directive that

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[81] Kromm & Sturgis, *supra* note 57, at 33.

[82] *Id.* at 33-34.

[83] *Id.*

[84] *Id.* at 17.

[85] *Id.* at 14.

[86] *Id.*

[87] *See* Joshua Norman, *Board May Consider Closing Free Clinics*, SUN HERALD, July 12, 2007, at A3.

displaced persons be provided uninhibited access to adequate health care.[88] Moreover, the health clinics provide a valuable resource to those employed by the businesses having flourished on the Coast in the wake of Katrina—the casinos and larger industries.

While the federal government has created tax breaks to help get the Mississippi casinos and other businesses off their feet, it still took them over a year to get reopened and to begin providing some work for the citizens who were essentially going without basic necessities.[89] The people who survived as shrimpers and seafood market workers lived off the income earned by harvesting the natural products in the Gulf of Mexico. Their survival was severely compromised by the waste that flowed back into the Gulf of Mexico as a result of the storm surge. Nevertheless, the federal government has not provided assistance to the shrimpers who lost their boats and the market workers who sold the products have pulled out of the Gulf.[90]

Others who sought to benefit from the aftermath of Katrina are the thousands of immigrants who have flocked to the Gulf Coast. Reportedly, some 30,000 immigrants traveled to the hurricane-ravaged coast after Katrina hit, many without proper documentation.[91] Many of these workers were low-skilled and sought work in demolition, brick laying, and rough carpentry. Despite the fact that these thousands of workers were let in the country, they have been treated without much dignity as human beings. Though the immigrants themselves do not necessarily fit the definition of displaced persons, there are many who already lived on the Coast who have suffered the same treatment as those that arrived post-Katrina seeking work. It is the failure of the government to look after these workers that is of paramount concern, as indentured servitude has been allowed to take place with no intervention from the government.[92] Companies have failed time and again to pay wages to the

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[88] *Guiding Principles*, *supra* note 11, at principle 18, 19.

[89] Kromm & Sturgis, *supra* note 57, at 14.

[90] *Id.*

[91] *Id.* at 25.

[92] *See id.* at 25-26.

immigrant workers, requiring the Mississippi Immigrant Rights Alliance to step in and recover over one million dollars in wages owed to the workers.[93] Rather than provide Department of Labor employees to ensure proper payment of wages and treatment of workers, the federal government has beefed up its Immigration and Customs Enforcement officers to set-up stings to catch illegal immigrants.[94] Focusing on the legal status of immigrants as opposed to focusing on federal and international laws that all men and women deserve an honest wage for an honest days' work is yet another example of the government's failure to treat coastal residents and workers as human beings. Principle 20 recognizes that "[e]very human being has the right to recognition everywhere as a person before the law."[95] It further provides for documentation to be provided to everyone for "the enjoyment and exercise of their legal rights."[96]

It is apparent that the federal government has failed in many ways to provide for the people who have suffered in the post-Katrina landscape. There are those afraid of leaving their toxic trailers because once you leave, you cannot go back. Despite FEMA's recent proposal to house the 60,000 people across the Coast still in trailers or in hotels for an unspecified period of time, there will be some too scared to leave the toxicity in favor of better accommodations due to this caveat of being forced into homelessness if the hotel rooms are taken away or if they try some other form of living arrangements.[97] The absence of jobs for those with skills not suited to the rising casino industry, such as the shrimpers, with no assistance from the federal government will continue to drag the recovery down. With no solid solutions for putting these people in permanent homes and no plans for future storms that could hit the Coast anytime, it is difficult to predict what will become of these individuals along the Gulf Coast. As long as lawmakers allow

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[93] *See id.* at 5.

[94] *See id.* at 26.

[95] *Guiding Principles*, *supra* note 11, at principle 20.

[96] *Id.*

[97] *See* Spencer S. Hsu, *FEMA to Let Katrina Victims Move from Trailers into Hotels*, WASH. POST, Sept. 5, 2007, at A8.

state leaders to obtain waivers which reduce the percent of grant money required to be distributed to low- to moderate-income residents,[98] the recovery will never be for "all people," just for those who can afford it.

IV. CONCLUSION

The ICCPR, ICERD, and the Guiding Principles on Internal Displacement placed a myriad of obligations on both federal and state government to provide for the basic needs of those Mississippians affected by Hurricane Katrina. Unfortunately, in Katrina's aftermath, many of these obligations have yet to be fulfilled. The human rights framework elaborated in the above referenced treaties and resolution confers basic rights which the United States and the State of Mississippi should be able to provide and respect. The ICCPR and ICERD are binding treaties ratified by the United States Senate with the same force of any other law enacted by Congress. However, many of the mandates prescribed in these documents are not respected even two years after the disastrous storm.

Observance of international human rights law is good for the United States, as well as local and state governments. Human rights law addresses innate and intrinsic rights which should not and cannot be ignored in a civilized society. When a family is homeless, when a child does not attend an adequate school, when a person cannot find gainful employment as a result of a natural disaster: these are human rights violations. In anticipation of other man-made or natural disasters, the United States government must respect the inalienable human rights of all people. The United States should respect the ICCPR, ICERD, and Guiding Principles the same way it respects the United States Constitution. Specifically, the United States and the State of Mississippi should move to apply these international standards to its domestic policy—because there can really be no true civil rights without the observance,

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[98] Media Matters for America, Media Ignored Mississippi's Use of Waivers to Redirect Funds Designated for Low-Income Katrina Victims, Aug. 30, 2007, http://mediamatters.org/items/200708300010 (last visited Nov. 15, 2007).

recognition, and implementation of human rights and humanitarian policy.

TWO YEARS AFTER THE STORM: THE STATE OF KATRINA HOUSING RECOVERY ON THE MISSISSIPPI GULF COAST

*John Jopling**

I. INTRODUCTION

In the early morning of August 29, 2005, one of the largest hurricanes in recorded history struck the United States. The eye of the storm was forty miles wide, extending from Waveland, Mississippi, to Slidell, Louisiana. Severe winds of up to 140 miles per hour and tidal surges of up to twenty-six feet hammered the shoreline seventy miles in either direction from the eye of the storm. The assault lasted ten hours; by the time it

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finally subsided, 231 Mississippians had lost their lives, and the Mississippi Gulf Coast was unrecognizable.[1]

The damage from Hurricane Katrina to Mississippi's housing supply was of such magnitude as to create an immediate state of emergency: 70,000 homes were destroyed, and 160,000 were damaged.[2] In the early aftermath, those who had stayed and survived took refuge in public shelters. Those who evacuated only to return and find their homes or apartments destroyed or uninhabitable took shelter wherever they could: in damaged but unoccupied structures, automobiles, churches, tents provided by early relief workers, or even blankets outside under trees. Later, as FEMA trailers finally began to arrive, these temporary structures averaging 240 square-feet in size served as housing for many residents of South Mississippi: by the spring of 2006, 100,000 Mississippians were living in 37,000 FEMA trailers.[3]

Given these harsh realities, it was not surprising that Governor Haley Barbour's Commission on Recovery, Rebuilding and Renewal identified the development of affordable housing as the "cornerstone" of Mississippi's Katrina recovery in December of 2005.[4]

This article addresses the State of Mississippi's response to the affordable housing crisis on the Coast. Part I describes the damage to existing housing stock and the heightened impact of the storm on low-income and minority communities. Part II describes and discusses the key recovery programs created by the Office of the Governor and approved by HUD. Part III offers a critique of these programs as neglectful of the needs of low-

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[1] Joshua Norman, *Death Toll Anything but Certain: Professor Leads Quest for Most Accurate List of Katrina Victims*, SUN HERALD, Sept. 30, 2007, at A1 (citing Miss. Dep't of Pub. Safety, Office of Crime Laboratories).

[2] OFFICE OF GOVERNOR HALEY BARBOUR, ONE YEAR AFTER KATRINA: PROGRESS REPORT ON RECOVERY, REBUILDING AND RENEWAL 15 (2006).

[3] *Barbour: Preparation Vital During Quiet Part of Hurricane Season* (WLOX television broadcast Aug. 4, 2006).

[4] GOVERNOR'S COMM'N ON RECOVERY, REBUILDING AND RENEWAL, AFTER KATRINA: BUILDING BACK BETTER THAN EVER 51 (2005), *available at* http://www.mississippi renewal.com/documents/Governors_Commission_Report.pdf [hereinafter GOVERNOR'S COMM'N REPORT].

income individuals and others who rely on rental property for shelter. Part IV describes additional tools for promoting affordable housing. Part V suggests several early lessons to be learned from the state's experience in confronting the affordable housing problem on the Gulf Coast.

II. IMPACT OF KATRINA ON AFFORDABLE HOUSING STOCK AND LOW-INCOME COMMUNITIES

Hurricane Katrina destroyed or damaged so severely as to render uninhabitable over sixty percent of the single family dwellings in southern Mississippi.[5] The impact of the storm upon multi-family rental units was even greater: seventy percent of such units in Hancock County were rendered uninhabitable, forty-six percent of such units in Harrison County were rendered uninhabitable, and thirty percent of such units in Jackson County were rendered uninhabitable.[6]

As staggering as these numbers appear, they must be considered in context. First, an affordable housing crisis already existed in Mississippi before Katrina. Mississippi, the poorest state in America, has historically suffered from a shortage of decent and affordable housing.[7] Secondly, the impact to housing from Katrina was not equally distributed across all communities.

Though it is popular to say, as President Bush did, that "[t]he storm didn't discriminate,"[8] every study conducted in the aftermath of Katrina reveals a disproportionate impact upon low-income and minority communities. For example, "house-

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[5] *See* Mississippi Beyond Katrina, http://www.mississippibeyondkatrina.com/help (last visited Mar. 18, 2008).

[6] *See* summary of MISS. CTR. FOR JUSTICE RENTAL UNIT SURVEY, HURRICANE KATRINA DAMAGE TO MULTI-FAMILY APARTMENT COMPLEXES IN JACKSON, HARRISON AND HANCOCK COUNTIES (2006), *available at* http://mscenterforjustice.org/about%20us/survey.html. *See also* Priscilla Frulla, *Apartment Losses Near 50%, 10,000 Units Fell Victim to Katrina*, SUN HERALD, Oct. 31, 2006, at B8 (citing Mississippi Center for Justice Rental Unit Survey).

[7] *See* Deborah H. Bell, *The University of Mississippi Housing Law Clinic: A Local Law Office and Regional Law Center*, 61 MISS. L.J. 501 (1991).

[8] CNN, *Bush Gets Ground Tour of Katrina Damage*, Sept. 12, 2005, http://www.cnn.com/2005/US/09/12/katrina.impact/index.html.

holds at or below 150% of the Federal Poverty Line" comprised ten percent of pre-Katrina households, "yet such households represented 13.5% of those within Katrina's Surge Inundation Limit."[9]

As the Governor's Commission notes, there were much larger numbers of lower-income households in the Katrina-devastated areas: "about 65 percent of the housing units exposed to the surge and over 57 percent of the units exposed to flooding were occupied by households with incomes below the U.S. median household income level."[10] In Hancock and Harrison Counties, almost seventy-five percent of the housing units were occupied by households living below the median income level for the nation.[11]

Low-income renters face a particular and acute crisis. The loss of rental housing stock precipitated an overall average increase in rental rates of thirty to fifty percent.[12] Extremely low-income households, those living at thirty percent or less of the area median income, have been served historically by public housing. Hurricane Katrina damaged or destroyed more than ninety percent of the 2,700 public housing units on the Coast.[13]

III. PROGRAMS CREATED TO ADDRESS IMPACT

In February of 2006, Congress awarded $5.05 billion in a special Katrina Community Development Block Grant allocation to Mississippi for the rebuilding effort.[14] This appropriation

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[9] Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21, 27 (2006) (citing GOVERNOR'S COMMISSION REPORT ON RECOVERY, REBUILDING AND RENEWAL 53 tbl.2 (2005)) (calculating percentage based on 10,228 low-income households out of 75,733 housing units exposed to surge).

[10] GOVERNOR'S COMM'N REPORT, *supra* note 4, at 54.

[11] *Id.* at 53.

[12] Tony Pipa & Steve Greene, *Forgotten Communities, Unmet Promises: An unfolding tragedy on the Gulf Coast*, OXFAM AMERICA, Aug. 21, 2006, http://www.oxfamamerica.org/newsandpublications/publications/briefing_papers/briefing_paper.2006-08-21.1978258942/Oxfam_GulfReport.pdf/?searchterm=forgottencommunities.

[13] OFFICE OF GOVERNOR HALEY BARBOUR, ONE YEAR AFTER KATRINA: PROGRESS REPORT ON RECOVERY, REBUILDING AND RENEWAL 20 (2006).

[14] Pub. L. No. 109-148, 119 Stat. 2680 (2005).

supports a number of programs created by the Governor's office and approved by HUD.

A. MDA–CDBG

The Mississippi Development Authority's Homeowner Assistance Program (HAP) is a two-phase program designed to help homeowners whose residences were damaged by Hurricane Katrina. "In short, one can characterize the Mississippi plan as a grand compensation and covenant purchase plan."[15]

The HAP was authorized by the Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act of 2006.[16] The Emergency Appropriations Act appropriated $11.5 billion in Community Development Block Grant (CDBG) funds for states affected by Katrina and Rita.[17] Mississippi received $5.058 billion of the initial CDBG disbursement.[18] The Act authorized Mississippi to spend the CDBG funds for activities authorized under Title I of the Housing and Community Development Act of 1974,[19] which includes the Disaster Recovery Assistance program within the larger CDBG program structure.[20] The "Disaster Recovery Assistance [program] provides grants to help areas recover from Presidentially-declared disasters."[21]

The HAP consists of two phases. Phase I was designed to

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[15] John A. Lovett, *Rebuilding a Region: Housing Recovery Efforts in the Wake of Katrina and Rita*, 20 PROB. & PROP. 49, 51 (2006).

[16] Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2779-80 (2005) (describing the Community Development Fund).

[17] Pub. L. No. 109-148, 119 Stat. 2680, 2779-81 (2005).

[18] Allocations and Common Applications and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Guarantees, 71 Fed. Reg. 7666 (Feb. 13, 2006) (Dep't of Housing and Urban Dev.).

[19] Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301 (1974)); *see also supra* note 16.

[20] NIXON PEABODY LLP & THE MISS. CTR. FOR JUSTICE, GUIDE TO APPEALS UNDER THE HURRICANE KATRINA HOMEOWNER'S GRANT PROGRAM OF THE MISSISSIPPI DEVELOPMENT AUTHORITY 4 (2006), *available at* http://micdbgappeals.nixonpeabody.com/Nixon%20Peabody%20Manual%20Peabody%20Guidebook%20to%20Mississippi's%20Homeowner%20Assistance%20Prgoram%20UPDATED%20201-17-97.pdf (updated Nov. 17, 2007).

[21] *Id.* at 4.

help homeowners outside the federally-designated flood plain who suffered storm surge damage. Phase II, which is still emerging, is aimed at lower-income residents who suffered storm surge damage, whether inside or outside the flood plain. Neither phase assists residents who suffered only wind damage.

i. Phase I

In March 2006, the Mississippi Development Authority (MDA) released its first plan, subject to Department of Housing and Urban Development (HUD) approval, in July 2006.

HUD released $3.4 billion of the $5 billion allocation.[22] The purpose of Phase I of the HAP is to:

> provide a one-time grant payment, up to a maximum of $150,000, to eligible homeowners who suffered flood damage to their primary residence as of August 29, 2005, from Hurricane Katrina. In exchange for the grant payment, a qualifying homeowner must agree to a covenant on their property that establishes building code, flood insurance and elevation requirements for them or any future owner of the land.[23]

This program is directed at those who relied to their detriment on governmental flood plain designations. Approximately 31,000 homeowners who suffered storm surge and had homes outside the flood plain have registered with FEMA.[24] "Approximately 19,000 of these homeowners, having relied on the NFIP with regard to the need to carry flood insurance, did not have flood insurance" to cover Katrina damage.[25] Seven thousand eight hundred homeowners did carry some flood insurance, but in many instances the amount of flood insurance was very insufficient to cover the loss.[26] "Grant payments under this program will act, in effect, as insurance

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[22] Lovett, *supra* note 15, at 51.

[23] MISS. DEV. AUTH., PARTIAL ACTION PLAN FOR KATRINA RECOVERY HOMEOWNER GRANT PROGRAM: PHASE I at 2 (2006), *available at* http://www.mississippi.org/userfiles/file/home_owners_assistance_program/hap3606%20final.pdf.

[24] *Id.* at 4.

[25] *Id.*

[26] *Id.*

proceeds" for homeowners without flood insurance or with minimal flood coverage.[27]

To qualify for assistance, homeowners must be outside the flood plain and not have had insurance to cover structural flood damage:

> Single-family homes, owner-occupied duplexes and manufactured housing including mobile homes are eligible for grants under this program. Under Hurricane Katrina Home-owner's Grant Program, homeowners may receive up to $150,000 or the insured value of their home times the percentage of damage the home received (whichever is less), less any insurance or FEMA payments for structural damage. If homeowners have an SBA disaster loan, SBA will perform a duplication of benefit analysis to determine if the grant proceeds would be used to repay the loan. In addition, if homeowners must elevate their houses when rebuilding to re-duce the risk of damage from future storms, they may be eligible for up to $30,000 to cover the higher cost of construction.[28]

Only one application per household is allowed, and the grant does not apply to any contents of the home—only to structural damage.[29] After receiving a grant, homeowners have sole discretion over the use of the funds. However, the funds will be handled for the homeowner by the mortgage company, and the proceeds will go first to any "past due installments owed on the Homeowner's mortgage loan with the Lender and any ad valorem taxes due and owed on the damaged property."[30] Also, "if funds are used for something other than repairing or rebuilding the home, the Homeowner should consult its tax advisor regarding the taxability" of the grant.[31]

The requirements for a Phase I grant are:

(1) You owned and occupied your home as of August

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[27] *Id.*

[28] Mississippi Home Help, Katrina Homeowner Grants, Phase I General Program Information, http://www.mshomehelp.gov/p1_default.htm (last visited July 27, 2007).

[29] Mississippi Home Help, Katrina Homeowner Grants, Phase I Grant Program Guidelines, http://www.mshomehelp.gov/guidelines.htm (last visited Aug. 6, 2007).

[30] *Id.*

[31] *Id.*

29, 2005.

(2) Your home was located in the Mississippi Counties of Harrison, Hancock, Jackson, or Pearl River.

(3) Your home was your primary residence on August 29, 2005.

(4) You maintained homeowner's insurance on the property.

(5) Your home was outside the pre-Katrina designated flood zone (FEMA-designated one-hundred-year flood zone) on August 29, 2005, yet suffered flood damage as a result of Hurricane Katrina.[32]

The following are covenants that grant recipients must agree to in order to receive a Phase I grant:

(1) Maintain flood insurance on damaged residence in perpetuity.

(2) Rebuild or repair to applicable codes and local ordinances.

(3) Rebuild to newly recommended FEMA flood elevations.

(4) Manufactured housing (mobile homes) must comply with the Federal Manufactured Housing Code.[33]

ii. Phase II

Phase II differs from Phase I in that homeowners who live outside the flood plain are eligible, but an income requirement of 120% of Area Median Income (AMI) has been added. The maximum compensation level is $100,000. "MDA is redirecting $700 million of the $3 billion initially allocated for Homeowner Assistance Grants to the Phase II Homeowner Grant Assistance Program."[34]

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[32] *Id.*

[33] *Id.*

[34] MISSISSIPPI DEV. AUTH., HOMEOWNER ASSISTANCE PROGRAM MODIFICATION NUMBER 4: PHASE II at 2 (2006), *available at* http://www.mshomehelp.gov/p2_action_plan.pdf [hereinafter MODIFICATION NUMBER 4].

Homeowners who fit the following guidelines are asked to register for Phase II:

(1) You owned and occupied your home as your primary residence on August 29, 2005.

(2) Your home was located in Harrison, Hancock, Jackson, or Pearl River Counties.

(3) Your home received flood surge damage as a result of Hurricane Katrina.

(4) Your household income is at or below 120% of the AMI.[35]

Homeowners receiving Phase II assistance will be required to demonstrate the commitment to follow through on certain actions in exchange for compensation. They must sign a legally binding document, which provides for the following:

(1) Homeowner will maintain recommended structure and flood insurance.

(2) The home they own and occupy meets the applicable building codes and local ordinances.

(3) When rebuilding, the home they own and occupy complies with FEMA guidance for base flood elevations.

(4) If the home is manufactured housing, it will comply with HUD's manufactured housing code and be elevated in accordance with FEMA advisory flood levels.

Any homeowner that fails to meet all of these terms and conditions may be required to repay all or a prorated portion of the financial assistance provided through this program.[36]

iii. Special needs

Grant awards for homeowners who meet the criteria for special needs will be calculated at one hundred percent of the uncompensated damage. Those who meet the following criteria

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[35] Mississippi Home Help, Katrina Homeowner Grants, Phase II, Housing Needs Assistance Program Guidelines, http://www.mshomehelp.gov/p2_guidelines.htm (last visited Aug. 13, 2007).

[36] *Id.*

may be eligible for special needs assistance:

> (1) Elderly: age sixty-five or over as of grant closing date; or
>
> (2) Disabled: any person who has a physical or mental impairment that substantially limits one of [sic] more major life activities; has a record of such impairment; or is regarded as having such an impairment as defined by the Social Security Administration; or
>
> (3) Household income at or below sixty percent of the AMI.[37]

iv. Elevation grants

Eligible homeowners may also receive a separate grant of up to $30,000 to defray the costs of elevating their homes. This grant would be made available to homeowners who meet the eligibility and program requirements.[38] Homeowners who had flood insurance at the time of the flood and are eligible for assistance from the National Flood Insurance Program (NFIP) are not eligible to receive the $30,000, as they should receive a like amount directly from NFIP. "The grant is for the increased costs of building to the new height regulations. Each property may be subject to an environmental review."[39]

Comments submitted during the public comment period suggesting the expansion of Phase II to renters, owners of rental property, and homeowners whose homes suffered damage from any source, among others, were rejected.[40]

B. Katrina Cottages

The Mississippi Alternative Housing Program is a pilot program funded by FEMA that is an attempt to implement an alternative form of disaster housing that is safer and more

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[37] MODIFICATION NUMBER 4, *supra* note 34, at 4.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 6.

comfortable than traditional FEMA trailers.[41] Applicants are selected from an eligible pool of Katrina survivors through a random proportional selection mechanism. Those who are eligible to participate in the program must:

> (1) Have been a permanent resident in one of Mississippi's three coastal counties (Hancock, Harrison and Jackson) on August 29, 2005.
>
> (2) Be a resident of the State of Mississippi living in a FEMA-provided travel trailer or mobile home in one of the three coastal counties as of April 1, 2007.
>
> (3) Be listed with FEMA as the applicant or co-applicant.
>
> (4) Live in the alternative housing unit for at least six months beyond September 1, 2007.[42]

"Anyone who is not currently living in FEMA-provided disaster housing is not eligible for the program . . . . [a] random, proportional selection will be used to determine who will participate in the program."[43]

The Alternative Housing program is authorized by § 2403 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006,[44] and administered by the Mississippi Emergency Management Agency. In addition to creating new types of units, the program is aimed at creating new strategies for disaster unit management and creating the opportunity for disaster victims to permanently reside in the alternative housing.[45]

The Mississippi program consists of two projects—the

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[41] DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, EVALUATION OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY'S ALTERNATIVE HOUSING PILOT PROGRAM (2007), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-39_Apr07.pdf [hereinafter FEMA EVALUATION].

[42] Miss. Emergency Mgmt. Agency, Mississippi Alternative Housing Program, http://mscottage.org/eligibility/ (last visited Aug. 13, 2007).

[43] *Id.*

[44] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, 120 Stat. 418 (2006).

[45] Miss. Emergency Mgmt. Agency, Mississippi Alternative Housing Program, http://mscottage.org/reservist/ (last visited Aug. 13, 2007).

"Green Mobile" project and the "Park Model and Mississippi Cottage" project.[46] The Green Mobile project proposed to build one hundred energy efficient one- or two-bedroom units from structural insulated panels. FEMA provided $5,890,882 for the project.[47] Original plans called for a larger Park Model and Mississippi Cottage project, funded up to $275,427,730, to build 7,261 one-bedroom Park Model units to replace FEMA travel trailers and 1,933 two- or three-bedroom Mississippi Cottages to replace FEMA mobile homes.[48] However, expectations are now set at between 4,000 to 6,000 units.[49] "All of the units are modular, stick-built homes that can be converted into permanent homes."[50]

In June 2007, the first Park Model unit went to Biloxi resident Katherine St. Amant, whose home was destroyed by Katrina.[51] As of June 2007, 247 individuals or families were approved for the Park Model unit; forty-seven have been approved for the two-bedroom Mississippi Cottage unit; and twenty-seven have been approved for the three-bedroom Mississippi Cottage unit.[52] As of November 2007, 655 units have been constructed, with 500 occupied.[53]

C. Rental Housing Development Programs

As described above, the central component of Mississippi's Katrina recovery plan consists of a two-tiered program of homeowner restitution. As originally designed by the state, no

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[46] *See* FEMA EVALUATION, *supra* note 41, at 3-4.

[47] *Id.* at 3.

[48] *Id.* at 4; *see also* Miss. Emergency Mgmt. Agency, Mississippi Alternative Housing Program, http://mscottage.org/reservist/ (last visited Aug. 13, 2007).

[49] Miss. Emergency Mgmt. Agency, Mississippi Alternative Housing Program, http://mscottage.org/reservist/ (last visited Aug. 13, 2007).

[50] *Id.*

[51] Press Release, Governor Haley Barbour's Office, Governor Barbour Gives First Cottage Keys to Biloxi Resident (June 21, 2007), *available at* www.governorbarbour.com/recovery/news/2007/jun/pr.FirstCottage.htm.

[52] *Id.*

[53] Keith Burton, *Placement of Mississippi Cottages to Replace FEMA Trailers Moving Slow*, GULFCOASTNEWS.COM, Nov. 8, 2007, http://www.gulfcoastnews.com/GCNewsKatrinaMississippiCottages110807.htm.

recovery funds were devoted to addressing the loss of rental property. However, following aggressive advocacy, MDA created a small-scale rental assistance program.

i. Small rental assistance program

In 2006, the Mississippi Development Authority unveiled a new program designed to "provide affordable rental housing by offering incentives for small-scale rental property owners—owners of properties containing between one and four rental units."[54] The program is budgeted at $262.5 million dollars, funded from the original congressional appropriation of CDBG Katrina rebuilding money.[55]

The program is structured to provide four types of assistance to landlords in Hancock, Harrison, Jackson, and Pearl River Counties: (1) rental income subsidy assistance; (2) repair or reconstruction reimbursement for Katrina-damaged property; (3) reconstruction or conversion reimbursement for non-Katrina damaged property; and (4) new construction reimbursement.[56]

The initial phase of this program (Round I) is open to all ownership entities, whether individuals, corporations, LLCs or partnerships. Non-profit organizations are encouraged to apply, and twenty million dollars is reserved for non-profits as a set-aside.[57]

Qualifying owners must agree to abide by MDA and HUD's standards of affordability, i.e., rents set at thirty percent of a tenant's gross annual income.[58] The owner must agree that *all* rental units covered by the program will be rented to tenants

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[54] MISS. DEV. AUTH., SMALL RENTAL ASSISTANCE PROGRAM APPLICATION GUIDEBOOK I (2007), *available at* http://www.mississippi.org/UserFiles/File/Home_Owners_Assistance_Program/Sample%20Rental%20Assist%20Documents/SRAP%20Book%201.4%2010012007.pdf.

[55] MISS. DEV. AUTH., SMALL RENTAL ASSISTANCE PROGRAM CDBG DISASTER RECOVERY ACTION PLAN AMENDMENT 1, 2 (2007), *available at* http://www.mississippi.org/UserFiles/File/Home_Owners_Assistance_Program/SmallRentalFinal%206_12.pdf.

[56] *Id.* at 2.

[57] *Id.* at 1.

[58] *Id.* at 11.

with incomes at or below 120% of the AMI. Additionally, the owner must agree to rent *a majority* of the rental units to tenants at or below eighty percent of the AMI.[59]

MDA began accepting applications for Round I of the small rental assistance program on September 10, 2007, with a deadline for applicants of October 26, 2007.[60] According to sources within the Governor's office, approximately eight-hundred applications were received. Assuming each application embraced the maximum of four units and was otherwise a qualified application, the program would result in the rehabilitation, reconstruction, or construction of 3,200 units of rental housing.

ii. Low income tax credits

The chief program upon which the state is relying to promote the replacement of affordable rental housing is the Low Income Housing Tax Credit program (LIHTC). The LIHTC, created by Congress as part of the 1986 Tax Reform Act, subsidizes developers of low-income rental housing by providing a complex system of tax credits, which in turn can be sold to others.[61] In exchange for these credits, developers agree to restrict the rents on a percentage of their units for a specified period of years and to dedicate those units only to tenants who meet income limits.[62] Specifically, the developer of a LIHTC property must opt to have either twenty percent or more of the building's residential units rent-restricted and occupied by renters whose income is fifty percent or less of the AMI, or have at least forty percent or more of its residential units rent-restricted and occupied by tenants whose income is no greater than sixty percent of the AMI.[63]

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[59] *Id.*

[60] *Id.* at 1.

[61] Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 212 (2003).

[62] *Id.* at 215.

[63] Daniel P. Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J. L. & POL'Y 537, 542 (1998).

III. CRITIQUE

The most frequent criticism of the Mississippi recovery plan is that, from its inception, it focused exclusively on the needs of homeowners and failed to take into account the needs of renters, and low-income renters particularly. At the local and statewide levels, this criticism has been advanced continuously by many, if not all, of the grassroots and faith-based organizations participating in recovery work on the Coast. Legal commentators have also noted the discrepancy, with some going as far as to say that "[n]eglect and exclusion of low-income renters has characterized Mississippi's plans for its special allocation of federal recovery and rebuilding funds."[64] Considering the fact that only five percent of the recovery funds are proposed to be used for rental property development, this criticism has considerable force.[65] This criticism is not simply an academic or theoretical one: twenty-eight percent of Coast residents were renters at the time of Katrina, and the post-Katrina rise in real estate costs does not suggest that the number of renters will decline in the near future.[66]

The failure of the state to devote any significant amount of the CDBG recovery money for the development of affordable rental housing on the Coast is not offset by the foreseeable rental development that will be stimulated by the LIHTC. LIHTC developments, which have a reduced rent obligation of fifteen years, do not promote long-term affordability. Moreover, while the program provides strong incentives to develop rental property for those earning sixty percent or less of the AMI and somewhat lesser incentives to develop rental units for those earning forty percent or less of the AMI, the program offers no incentives to develop rental units that are affordable to people earning less than forty percent of the AMI.[67]

Moreover, since the GO Zone encompasses forty-nine counties in the state, and most of the non-coastal counties enjoy

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[64] Hooks & Miller, *supra* note 9, at 25 n.13.

[65] *Id.*

[66] UNITED STATES CENSUS (2005).

[67] Ballard, *supra* note 61, at 235.

much lower land prices than the Coast, there is no guarantee that affordable developments will be placed where they are most needed. Mississippi Home Corporation data regarding those projects approved for LIHTC development provide cause for concern. Specifically, of the eight LIHTC developments placed in service since Katrina, only one is located in a coastal county. Four of the developments are located in Hinds County, and three of the developments are located in Madison, Lauderdale, and Attala Counties. Stated in terms of the number of units created, 553 units have been placed in service since Katrina, but only ninety-six of these units are located on the Coast.[68]

IV. POTENTIAL EMERGING AFFORDABLE HOUSING TOOLS

In an effort to address the shortcomings and oversights of the state's Katrina-recovery plan, housing and social justice advocates are working in partnership with local non-profit groups to promote the use of additional nongovernmental and quasi-governmental tools which have a demonstrated ability to promote affordable housing.

A. Statewide Affordable Housing Trust Fund

An affordable housing trust fund is another proven mechanism for promoting affordable housing, though one which requires a dedicated source of revenue. There are currently almost six hundred affordable housing trust funds in thirty-nine states, with annual revenues of $1.6 billion.[69] The affordable housing trust fund promotes affordability by providing incentives beyond those offered by the LIHTC.[70] For example, the housing trust fund may cover land costs and other predevelopment fees.

In the aftermath of Hurricane Katrina, a broad-based

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[68] Miss. Home Corp., Table, GO Zone Credit Authority Low-Income Housing Tax Credit Direct 6 Counties [George, Hancock, Harrison, Jackson, Pearl River, and Stone] (Sept. 11, 2007) (on file with author) (compiled at the request of the Gulf Coast Renaissance Corporation).

[69] CTR. FOR CMTY. CHANGE, HOUSING TRUST FUND PROGRESS REPORT 2 (2007), *available at* http://cccfiles.org/shared/publications/downloads/HTF%2007%20final.pdf.

[70] *Id.*

coalition of community groups, concerned about the obvious housing problem on the Coast, created Housing Mississippi. Members of this coalition include AARP Mississippi, Back Bay Mission, Coalition for Citizens with Disabilities, Deep South Delta Consortium, Enterprise Corporation of the Delta/Hope Community Credit Union, First Delta Federal Credit Union, Habitat for Humanity of the Mississippi Gulf Coast, Lawyers' Committee for Civil Rights Under Law, Local Initiatives Support Corporation, Lutheran Episcopal Services in Mississippi, Mississippi Action for Community Education, Mississippi Center for Justice, NAACP Mississippi State Conference, NeighborWorks America, Oxfam America, and Quitman County Development Organization. Housing Mississippi is in the second year of a campaign for the adoption of a statewide housing trust fund in Mississippi.

The Housing Trust Fund proposal developed by Housing Mississippi would include twenty million dollars per year in dedicated revenues to support the fund.[71] The Housing Trust Fund would be administered by the Mississippi Development Authority and managed by an eleven-member oversight board.[72] Housing Trust Fund money would be used to provide grants, loans, loan guarantees, and/or loan subsidies to eligible grantees to fund residential housing and/or related services to households with incomes at or below eighty percent of the MFI.[73] The Trust Fund provides for income targeting: one hundred percent of Trust Fund dollars must be used to serve households with incomes at or below eighty percent of MFI.[74] At least sixty percent of the Trust Fund dollars must be used to serve households with income at or below fifty percent of the MFI.[75] At least fifty-five percent of that sixty percent must be used to serve households with income at or below thirty percent of the MFI. [76] The Trust Fund also provides for geographic equity: at

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[71] H.B. 896, Reg. Sess. (Miss. 2008).

[72] *Id.* §§ 3-4.

[73] *Id.* § 5.

[74] *Id.*

[75] *Id.* § 5(2)(a).

[76] The thresholds for income targeting are based on income data for Mississippi's

least fifty-five percent of the Trust Fund dollars must be used to serve households living in rural areas of Mississippi Community Land Trusts.[77]

B. Community Land Trusts

A community land trust is a mechanism that provides long-term affordability of owner-occupied homes by separating the ownership of the land from the ownership of the house built upon it. The land trust retains ownership of the land and leases it to the owner of the house. Since only the house itself must be purchased, the price of home ownership can become affordable. The amount of equity an owner is allowed to claim upon sale of the house is usually limited to less than market value to ensure long-term affordability. Although not market rate, the owner nonetheless builds greater wealth than by renting.

The North Gulfport Community Land Trust (NGCLT) is a 501(c)(3) non-profit organization founded in 2004 to "address the environmental degradation, wetlands filling, land speculation, and potential gentrification of the North Gulfport community."[78] This once-vibrant African-American neighborhood had fallen into disrepair and was affected by serious flooding due to the filling of nearby wetlands. This flooding was exacerbated by Hurricane Katrina.[79]

The vision of the NGCLT is to rebuild a community by building new homes and refurbishing the housing stock, but also by restoring Martin Luther King Jr. Boulevard, bringing economic development incentives to the neighborhood, developing community playgrounds and gardens, and initiating a strong community arts campaign.[80]

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households. According to the U.S. Census, 61.5% of Mississippi's households with incomes below eighty percent of the MFI have incomes below fifty percent of the MFI. UNITED STATES CENSUS (2005). Of the households with incomes below fifty percent of the MFI, 55.6% have incomes below thirty percent of the MFI. *Id.*

[77] H.B. 896, Reg. Sess. (Miss. 2008).

[78] N. Gulfport Cmty. Trust, About, http://www.ngclt.org/ (last visited Feb. 19, 2008).

[79] E-mail from Jason Mackenzie, Executive Director, N. Gulfport Cmty. Land Trust, to John Jopling, Co-Director, Affordable Housing Initiative, Miss. Ctr. for Justice (Aug. 14, 2007, 20:51:20 CST) (on file with author) [hereinafter E-mail].

[80] N. Gulfport Cmty. Trust, Current Projects, http://www.ngclt.org/projects.htm (last

The NGCLT provides permanently affordable housing through the Community Land Trust model.[81] This model, common among the nearly two hundred Community Land Trusts throughout the nation, provides permanent affordable housing to low- and moderate-income individuals and families through the ground lease and resale restrictions. The ground lease allows the NGCLT to remove the value of the land from the sales price, as well as ensure that the land is never lost to speculation. The resale restriction ensures that any grants applied to the purchase price remain with the home and not with the homebuyer. This model is common among the nearly two hundred Community Land Trusts around the nation, some of which are almost forty years old.[82]

The NGCLT utilizes a number of tools to provide permanently affordable housing through partner organizations and supporters. The organization is run by members who are invited to become the Board of Directors. Legal partners assist in locating pro-bono advice for land closings and other legal matters. Volunteer partners, like Hands On and Youthbuild, provide much of the construction labor, and the organization also seeks alternative homebuyer grants.[83]

NGCLT's construction projects rely heavily on partnerships. For example, two historic homes, one built in 1917 and one in 1925, were donated to the NGCLT to be restored and sold to low-income clients at affordable prices. These two homes were moved from their previous locations, approximately six miles away, to their new sites in North Gulfport. Grants to restore the homes were sought and received from the Mississippi Department of Archives and History, among other groups, and volunteer labor was used to carry out the restoration efforts. When all is complete, NGCLT expects to sell these homes at affordable prices to low-income families in 2007 and 2008.[84]

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visited Feb. 20, 2008).

[81] N. Gulfport Cmty. Trust, Vision and Needs, http://www.ngclt.org/vision.htm (last visited Feb. 20, 2008).

[82] *See* E-mail, *supra* note 79.

[83] *Id.*

[84] *Id.*

Since the storm, the Land Trust has acquired two homes that are being remodeled and will be for sale to low-income clients. One modular home was donated by Unity Homes and is serving as the Land Trust office. NGCLT serves only those persons below eighty percent of the AMI.[85]

C. ECD–Hope

Home Again, Inc., is a project of ECD–Hope, a non-profit 501(c)(3) corporation originally founded in 1994.[86] Home Again, Inc., was initially funded in February 2006 by Mississippi author John Grisham, Home Depot, and an anonymous donor.[87] The project produces affordable modular housing units in Hancock County, the county hit hardest by Hurricane Katrina.

Home Again, Inc., began by providing up to $80,000 in forgivable loans to fifteen homeowners who met the following requirements: (1) they lost their home because of damage from Katrina; (2) they are low- to median- income as defined by HUD; and (3) they live in a designated area of Pass Christian.[88]

Home Again, Inc., works in partnership with private modular housing developers. The average cost of an unelevated home is approximately $88,000.[89] If elevation is necessary, the average cost per home is approximately $119,000.[90]

A subsequent gift from Mississippi entrepreneur Jim Barksdale has allowed Home Again, Inc., to offer up to $50,000 in a forgivable loan to up to twenty additional families. To date, Home Again, Inc., has placed sixty-four houses on sites, of which sixty-one are already occupied.[91]

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[85] *See* E-mail, *supra* note 79.

[86] Telephone Interview with Jessie Lawson, Senior Program Officer, ECD-Hope (Aug. 10, 2007).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Telephone Interview with Phil Eide, Vice President of Housing, ECD-Hope (Mar. 18, 2008).

D. Realtors Relief Fund

An important effort to address the absence of programs directed at renewing the stock of affordable rental housing is the Realtors Relief Fund, which is a project of Lutheran Episcopal Services of Mississippi. Initially funded with a $250,000 grant from the Mississippi Association of Realtors, the project was designed specifically to create affordable rental units.[92] As Bob Lowery, the project's director, states, "this project was necessary because renters—an entire socio-economic class—had been left out of the recovery."[93]

The Realtors Relief Fund takes applications directly from owners of small rental properties. The fund will go in fifty-fifty with qualifying landlords, up to $10,000 per unit, in order to rehabilitate each unit.[94] Lutheran Episcopal Services, a 501(c)(3) non-profit corporation, obtains materials at discount and much of the labor is provided by volunteers.[95]

In return for the rehab assistance, owners execute a memorandum of understanding. The owners agree to rent to median income tenants for one year at the pre-Katrina monthly rental rate.[96] For months thirteen through twenty-four, the owner agrees to increase rent by no more than the federally established cost-of-living increase.[97]

Since its inception in June of 2006, the relief fund has rehabilitated twelve units, all of which are currently occupied by renters.[98] The National Association of Realtors recently donated $500,000 to the fund.[99]

V. CONCLUSION

Hurricane Katrina's devastating effects fell dispro-

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[92] Telephone Interview with Bob Lowery, Director, Realtor Relief Fund, Lutheran-Episcopal Services in Mississippi (Aug. 13, 2007).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

portionately upon low-income and moderate-income residents of Mississippi. The recovery programs implemented thus far fail to take this significant fact into account. The state has repeatedly sought and obtained waivers from HUD of the congressionally-mandated requirement that fifty percent of the CDBG funds appropriated for Katrina housing recovery be targeted towards the needs of low- or moderate-income residents. As a result, the state's housing recovery has failed to address the needs of a substantial segment of South Mississippi's population, the very segment that was underserved before Katrina.

Grassroots organizations on the Gulf Coast have aggressively advocated for more attention to the needs of low- and moderate-income Mississippians. Over fifty organizations have banded together in the Steps Coalition to promote a more just and equitable recovery. These organizations include many mainstream social service agencies, as well as progressive and reform-minded groups, faith-based and otherwise.

The efforts of non-profit and grassroots organizations have also resulted in small-scale projects designed to replace housing stock with both ownership and rental units. These projects serve as affordable housing laboratories from which successful models could be replicated on a larger scale. The state's policy and decision makers would be well-advised to invite the participation of others, including members of the faith-based and social justice communities, into the process of formulating programs to meet the remaining post-Katrina housing needs of the Mississippi Gulf Coast.

MITIGATING DISASTER: LESSONS FROM MISSISSIPPI*

*Karen A. Lash*** *and Reilly Morse****

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I. INTRODUCTION

Hurricane Katrina blew open the door to perhaps the largest and broadest outpouring of pro bono legal assistance in the history of the American legal profession. The Young Lawyers Division (YLD) of the Mississippi Bar estimates that it coordinated free legal help for over 5,800 storm victims in the six months following the storm.[1] The Mississippi Center for Justice and its national affiliate, the Lawyers Committee for Civil Rights Under Law, estimate the value of pro bono legal services provided to storm victims in Mississippi in 2006 alone to exceed three million dollars.[2] Volunteer legal representation underpins many accounts of the recovery process in both the national media and specialized journals of law,[3] housing,[4] and philanthropy.[5] This article offers lessons learned about disaster lawyering and leveraging pro bono by two public interest attorneys brought together at the inception of the disaster recovery effort.

Four overriding themes link these lessons together and give meaning to the details: (1) one's ability to triage and absorb a massive new caseload is only as good as the strength and integration of the state's delivery and pro bono system before the disaster, so work to improve existing service now; (2) to ensure that the pro bono client community gets a fair share of the recovery pie, advocates must get a seat at the policymaking table; (3) the recovery phase is an opportunity to reject the status quo of poverty by rebuilding and reinventing new systems

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of Gulfport. He also served as law clerk for Mississippi Supreme Court Justice Michael Sullivan. Morse is a graduate of Millsaps College and the University of Mississippi School of Law.

[1] Amanda K. Jones, *Young Lawyers Message: Standing Ready to Assist the Public after Hurricane Katrina*, THE MISS. LAWYER, Winter 2005-06, at 14.

[2] Nicole Wallace, *Legal Wrangling*, THE CHRON. OF PHILANTHROPY, Aug. 23, 2007, at 34 (noting 2006 hours). Records for 2007 hours are on file at the Mississippi Center for Justice offices.

[3] Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most In Need*, 43 Cal. W. L. Rev. 21 (2006).

[4] Trisha Miller, *After Katrina: Fighting to Survive*, SHELTERFORCE, Sept.-Oct. 2005, http://www.nhi.org/online/issues/143/afterkatrina.html.

[5] Wallace, *supra* note 2, at 34.

that promote fairness and equity for all; and (4) lawyers play an essential role after a disaster in helping people put their lives and communities back together.

Mississippi as a case study for lessons and imperatives learned may seem too extreme to be instructive in other states, as demonstrated by its worst-place ranking on key measures of social well-being.[6] The picture for Mississippi's working poor is the second worst in the nation: 41% of working families with children earn no more than 200% of the federal poverty limit; among minority households, the rate jumps to 57%.[7] This entrenched, manmade social disaster exacerbates difficulties inherent in any recovery effort. Mississippi started with one legal aid attorney for every 18,266 poverty-level Mississippians[8]—compared to one for every 6,861 nationally[9]—one sparsely staffed pro bono program, and a lackluster pro bono culture.[10]

Then Katrina delivered a massive new population of income-eligible clients, many of whom still remain far from

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[6] As of 2000, Mississippi ranked first in child poverty (27%) and elder poverty (18.8%), and second in overall poverty (19.9%). Mississippi ranked fifty-first in household income as measured by the United States Department of Housing and Urban Development Area Median Income ($40,700) and by Average Adjusted Gross Income ($34,006), and fiftieth in median household income ($31,330). Mississippi ranked first in percentage of persons over twenty-five years old without a high school diploma or its equivalent (27%). Mississippi ranked first in percentage of single parent households with children (10.1%). UNITED STATES CENSUS 2000.

[7] EDWARD SIVAK & VINCENT MANGUM, MISSISSIPPI ECONOMIC POLICY CENTER, ENTERPRISE CORPORATION OF THE DELTA, INCREASING THE RETURN: INVESTING IN MISSISSIPPI'S FAMILIES 7 (2006), http://www.mepconline.com/images/admin/spotedit/attach/0/MEPC_-_Working_Families_Report_-_Web.pdf; *see also* The Working Poor Families Project, Mississippi Indicators and Data, http://www.workingpoorfamilies.org/indicators.html (last visited Feb. 1, 2008).

[8] Mississippi has thirty legal services lawyers. Mississippi Volunteer Lawyers Project, Mississippi Collaboration Expands Pro Bono Resources (Oct. 12, 2007), http://www.mvlp.net/news/80/. Mississippi's poverty population in 2005 was 548,000. Legal Services Corp., Program Information: Mississippi, http://www.lsc.gov/map/state_T32_R31.php.

[9] Alan W. Houseman, Ctr. for Law & Soc. Policy, The Future of Civil Legal Aid in the United States 11 (Nov. 2005), http://www.clasp.org/publications/future_legal_aid.pdf.

[10] According to Shirley Williams, the Executive Director of Mississippi's only pro bono program, fewer than 500 cases had been formally placed with Mississippi lawyers in 2004.

recovery. As of August 29, 2007, Mississippi had about 50,000 people living in FEMA trailers, thousands still receiving rental assistance, and untold numbers who have doubled and tripled up in the homes of friends and relatives.[11] Of the four legal aid attorneys covering the six coastal counties, two lost their homes and their Gulfport office was destroyed.

Much has changed, by necessity. New private and public Mississippi legal community collaborations, access to justice initiatives and funding mechanisms,[12] and progress towards creating a first-class call center have been the cornerstone of Mississippi's response. So, despite the extreme poverty baseline, the unsurpassed determination and inspiration of so many dedicated Mississippians and their legions of national partners who are working to reinvent more just and inclusive communities in our nation's poorest region can indeed provide a useful blueprint if the unthinkable happens elsewhere in the nation.

II. BEFORE THE DISASTER

A. Build the relationships.

If a program operates in isolation before a disaster, it amplifies the impact of the disaster. An effective response requires coordination, coordination requires trust, and trust in turn must precede the chaos. Tangible fruits of pre-existing relationships include, for example, the exchange of contact

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[11] Mike Stuckey, *Katrina Dried Up Rental Market*, MSNBC, May 2, 2007, http://risingfromruin.msnbc.com/2007/05/rentals.html ("Others, like welder Nathan Cranmer, 27, who grew up in Kiln and lost his $900-a-month rental home on St. Charles Street in Bay St. Louis in Katrina, bunked in shelters, trailers and with relatives while looking for affordable new digs to rent.") Over the course of forty-four legal clinics over two years, the authors encountered numerous families in similar positions who were temporarily residing with relatives or friends.

[12] A five-dollar charge was added to chancery court filing fees in 2006. *See* MISS. CODE ANN. § 25-7-9(2)(k) (Supp. 2007). In 2007, the Mississippi Supreme Court distributed over $250,000 to legal services programs for the poor. Press Release, Mississippi Supreme Court, Mississippi Supreme Court to distribute Civil Legal Assistance Funds (July 25, 2007), http://www.mssc.state.ms.us/news/071907CivilLegal%20Assistancefunds.pdf.

information with those who run the local pro bono program and state and local and minority bars; do pro bono coordination at local law firms; and staff other legal services and advocacy organizations, law schools, government law and policy offices, and the social service agencies that work with the pro bono client population. If a program does not have this broad network, and it seems too daunting to develop, break it down into manageable parts. Determine which new relationships will best leverage the existing goals, and start there.

B. Launch a Disaster Preparedness and Response Committee.

The "committee" approach is an organic way to develop relationships with the broad spectrum representing the profession and academy and new synergies having nothing to do with disasters. Regardless of who leads the discussion, make every effort to advance the preparedness conversation. A preliminary agenda for the committee might include the following:

> Define everybody's role.
>
> Does each office have its own disaster plan, assurance that all computer documents and records are being backed up, and the ability to retrieve information remotely in an emergency?
>
> Who checks on the safety of staff and reports out to the partners?
>
> What if telephones, cellphones, and/or electricity fail?
>
> Which entity will facilitate the local and national (if needed) volunteer effort?
>
> Who will pursue a supreme court order allowing out-of-state volunteers to give in-state pro bono assistance?
>
> Will firms each take responsibility for updating an issue in the Attorney Training Manual (see below)?

Have point people from each office been identified and their contact information circulated?

Who will provide bilingual services?

On September 8, 2005, a historic convening occurred among representatives of the Mississippi and Magnolia Bars, the judiciary, the state's law schools, and the legal services and public interest law firms.[13] Key pieces of Mississippi's recovery puzzle sprang from this early coordination, including the Mississippi Supreme Court's adoption of a rule admitting out-of-state attorneys to practice *pro hac vice* for clients referred by the Mississippi YLD.[14]

C. Draft a Volunteer Attorney Disaster Training Manual.

In prior hurricanes, the Mississippi YLD developed and implemented some disaster response systems and materials, including an early version of a Disaster Legal Assistance Reference Manual. Following the hurricane, this manual was substantially expanded and updated to cover a wide array of topics.[15] Updating is one thing; first-time drafting, which turns on quirks of local and state conditions and legal doctrine, is quite another. The message is clear: every state should have a disaster manual for volunteers before it is actually needed. This lesson has an important footnote, if the disaster zone lacks electricity or the Internet, make hard copies of the manual, and deliver them. In Mississippi, it took a while to realize that resources were not being used because first responders were not aware they existed.

Speaking two months after Katrina at the annual Equal

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[13] Mississippi Center for Justice, Katrina Archive, http://mscenterforjustice.org/policy/katrina.html (last visited Feb. 2, 2008).

[14] In Re: Rules of Professional Conduct, Order Miss. Supreme Court No. 89-R-99018 (Oct. 14, 2005).

[15] *See generally* THE MISSISSIPPI BAR, YOUNG LAWYERS' DIVISION, DISASTER LEGAL ASSISTANCE REFERENCE MANUAL PART 1, http://www.msbar.org/admin/spotimages/1036.pdf; THE MISSISSIPPI BAR, YOUNG LAWYERS' DIVISION, HURRICANE KATRINA: DISASTER LEGAL ASSISTANCE REFERENCE MANUAL PART 2, http://www.msbar.org/admin/spotimages/1069.pdf.

Justice Works conference, Karen Lash asked for a show of hands from everyone living in a state that could experience a natural and/or manmade disaster.[16] Every hand went up. But when she asked for a show of hands indicating which states had a disaster plan and existing manual for pro bono disaster volunteers, only individuals from California, Florida, and New York raised their hands. Even individuals from these three states were not sure whether their materials were comprehensive or outdated. Sadly, too few of us are ready.

At that two-month mark Mississippi pro bono advocates were just finalizing a state-specific manual. Building on Morrison & Foerster's quick update of their 9/11 Helping Hands Disaster Manual,[17] advocates adopted their federal sections and focused on Mississippi law and the endless arcane questions regarding the applicability of existing law in a disaster situation. University of Mississippi School of Law Professor and Civil Legal Clinic Director Deborah Bell coordinated the manual drafting effort, assisted by a talented team of clinicians and students recruited through requests for help on the clinical professors' listserve.[18]

D. Review existing state laws, policies and regulations.

Analyze laws defining the governor's powers and

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[16] Karen Lash, Hurricanes Rita & Katrina Panel, Equal Justice Works Career Fair & Conference (Oct. 18, 2005).

[17] MORRISON & FOERSTER LLP, HURRICANE KATRINA HELPING HANDBOOK: A RESOURCE FOR INDIVIDUALS, FAMILIES, AND SMALL BUSINESSES (Sept. 9, 2005), http://www.mofo.com/about/Katrina.pdf.

[18] *See* KatrinaLegalRelief.org, http://katrinalegalrelief.org/index.php?title=Katrina_Legal_Relief.org; *see also* KatrinaLegalRelief.org, Hurricane Katrina: Legal Issues, http://katrinalegalrelief.org/katrina_manual.pdf. Deborah Bell credits the Manual to:

> [A] joint effort of the University of Mississippi Civil Legal Clinic and volunteer students and professors, the Clinical Legal Education Association and the Association of American Law Schools Section on Clinical Legal Education. Clinical faculty and students from the law schools at Arizona State, Arkansas (Little Rock), Ave Maria, California (Boalt Hall), Columbia, Connecticut, CUNY, Detroit, Drake, Georgia, Harvard, Howard, Illinois, Minnesota, New Mexico, St. John's, St. Thomas, Syracuse, Thomas Cooley, Tulsa, Western New England and Yale contributed to this effort.

KatrinaLegalRelief.org, http://katrinalegalrelief.org/index.php?title=Introduction.

responsibilities in emergencies, the state's ability to regulate private activities, and the laws that protect—or fail to protect—lower-income client populations. Every state has gaps and obsolete statutes that need updating, many of which can help clients under both emergency and ordinary conditions.

Low-income peoples' experiences in disaster states demonstrate the devastating impact of inadequate housing and consumer protection laws. For example, tenants are often pushed into homelessness when price-gouging protections do not apply to rents or eviction doctrine fails to provide tenant protections in disasters.[19] Similarly, poor tenants' health and safety are jeopardized when local law does not allow tenants to deposit rent in escrow accounts pending repairs to make a home habitable. Especially important will be those provisions that affirmatively protect people after a disaster. For example, Mississippi Center for Legal Services litigation director Jeremy Eisler knew of a state statute authorizing the governor to impose a moratorium on disaster-related mortgage foreclosures,[20] and immediate advocacy persuaded Governor Barbour to issue the required executive order.[21]

An invaluable tool now available for this kind of review is *A Resource Guide of Emergency Disaster Response, Relief, and Recovery Law* co-authored by volunteers at Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., and King & Spaulding, LLP.[22] Their eleven-state survey of state laws identifies key legal provisions to give disaster legal response committees a huge head start.

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[19] Mississippi advocates helped secure an Attorney General's opinion that the price-gouging statute, MISS. CODE ANN. § 75-24-25 (1972), applied to rent. Price Gouging, Op. Miss. Att'y Gen. No. 2005-0554, at 2 (Nov. 21, 2005), *available at* 2005 WL 3775648.

[20] *See* MISS. CODE ANN. §§ 89-1-301 to -329 (2006).

[21] Haley Barbour, Miss. Gov., Ex. Order No. 939 (Aug. 27, 2005), *available at* http://www.governorbarbour.com/old/EO939.htm.

[22] Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., & King & Spaulding, LLP, *A Resource Guide of Emergency Disaster Response, Relief, and Recovery Law* (Oct. 2006) (on file with authors).

III. After the Disaster

What follows will be easier if some or all of the above has been done beforehand. But in any event, the following additional items should be on post-disaster response to-do lists:

A. Convene a team of local and national experts immediately to assess needs and gaps.

Key players on the team could include representatives from the ABA Center for Pro Bono, ABA YLD, local and national legal services offices, national firms, law school clinics, IT professionals, and activists and professionals who know about local resources in the affected area. It is particularly useful to call on people and organizations with disaster response experience. The team can take inventory of needs and publicize how those outside the region can help. Many in the Mississippi disaster legal recovery world forged relationships in ad hoc fashion as the relief effort developed—and invariably found our colleagues eager to help us and incredibly generous with their time and expertise.

There is great value in speaking to those with long-term disaster response experience. To cite but one experience, North Carolina Legal Services attorneys recounted problems that arose years after Hurricane Floyd struck the area, including discriminatory municipal rezoning practices and predatory lending practices that siphoned off equity from low-income home grant recipients, impacting our dealings with local governments and subprime lenders.[23]

B. Publicize the importance of directing charitable dollars to legal aid efforts.

The philanthropic spirit after a disaster is deeply inspiring. In the wake of Katrina thousands of lawyers and law firms, like so many others, donated generously to the Red Cross and

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[23] Regional Convening on Affordable Housing, Jackson, Miss., December 15-16, 2005. Children's Defense Fund, North Carolina Association of Community Development Corporations, co-convenors.

Salvation Army. Although worthy causes, their place at the head of the line for charitable donations meant that by the time legal aid, pro bono, and other advocacy organizations asked for money, many wallets were empty. Yet lawyers are essential to the recovery effort, because the justice system crumbles post-disaster and creates a whole new population of clients. Either the team described above or the state bar association can help convey this message in the days and weeks after the disaster. Make it a top priority to have or add on-line donation capability to the websites of disaster legal response partners. Probono.Net helped the Mississippi Center for Justice achieve this technological staple in the first few days post-disaster, enabling immediate contributions.

C. Expand fulltime lawyer capacity—if possible.

An essential need is to expand capacity of local public interest lawyering. Legal services programs were not able to meet the pre-disaster need—adding staff post-disaster is not a luxury item. The Gulf Coast benefitted immeasurably by the Katrina Initiative launched by Equal Justice Works, adding nineteen lawyers to local advocacy firms in the four hurricane-affected states.[24] This effort was funded by matching foundation money with law firm and corporate funding partners and has proven to be very effective for post-disaster mitigation of disaster-related damage. By drawing upon existing locally-rooted talent, and by including experienced attorneys along with new graduates, Equal Justice Works accelerated the ability to engage in advocacy on behalf of lower-income and minority storm victims. Other organizations made key contributions to expanding Mississippi legal staff, including JEHT Foundation, Minnesota Bar Association, American Bar Association Section of Business Law, AARP Foundation, Ford Foundation, and Fannie Mae Foundation.

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[24] Equal Justice Works, Katrina Legal Fellowships, http://www.equaljustice works.org/programs/katrina/fellow (last visited Feb. 1, 2008).

D. Fully exploit pro bono resources: national advocacy groups, the private bar, and law schools.

If the disaster is enormous, it may take some time to say "yes" to the offers to help. The team described above should help manage the offers while individual members implement their response plans. Key to success will be bulking up the staff it takes to coordinate and build suitable pro bono projects—it is never fully appreciated how much effort goes into multiplying services through pro bono help. Trainings and new materials must be developed, along with intake forms, procedures for processing cases, lawyers to determine which matters are ripe for volunteers, whether it can be handled remotely or will require local assistance, staff to answer volunteer questions, mechanisms to update volunteers with the many inevitable regulatory and rules changes, and much more.

Mississippi Center for Justice's Biloxi office depended first and foremost upon the well-stuffed rolodex of its founding president, Martha Bergmark, who drew on decades of public interest legal service to recruit first-responders[25] who helped coordinate hundreds of volunteers from the Student Hurricane Network and law firms, ensuring that orientation packages and files were ready for the upcoming week. As the flow of volunteers continued, the Mississippi Center for Justice developed orientation materials including short films and audio slideshows to enrich the volunteers' experience with images and maps, to recruit other volunteers upon return home, and to free up local staff to conduct other work.

The stream of in-state volunteers has been invaluable—there is no substitute for "boots-on-the-ground," particularly when the ground is wet. Mississippi Center for Justice and its national affilliate, Lawyers' Committee for Civil Rights Under Law, mitigated Katrina's damage with the help of scores of lawyers and law students who showed up—and continue to do

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[25] These first responders included Bonnie Allen, Benetta Mansfield and Karen Lash, who arrived in Jackson while countless others worked from afar on raising funds; collecting materials, prospective volunteer names, and contact information; improving the website to ensure timely updates; and other activities.

so—with appropriately modest expectations about the level of organization they will find when they arrive. DLA Piper and Latham & Watkins, two of the largest firms in the world and country, worked alongside small local firms like Harrang Long Gary Rudnick in Portland, Oregon; Citigroup's and Pfizer's in-house corporate law departments; and nonprofit organizations like AARP Foundation Litigation. These lawyers diligently did whatever needed to be done.

As the team and response plan are pulled together, remember the need for customized strategies to reach traditionally invisible populations. Mississippi benefited from the expertise and relationships of Mai Phan, a San Jose, California lawyer active with the Northern California Vietnamese American Bar Association. She recruited a dozen bilingual lawyers and students from around the country to staff a clinic that targeted Vietnamese Mississippians needing legal services post-Katrina.[26] Largely monolingual, many of these people lost nearly everything. Serving these clients meant obtaining protections for workers who for decades provided the backbone for the shrimping and casino industries. Mississippi Center for Justice also served as custodian for wireless translation headsets to enable non-English-speaking communities to participate in civic events in Mississippi and Louisiana.[27]

While many people can and have made the trek to Mississippi to volunteer their legal and other services, many for the first time, many other lawyers want to help but cannot travel for work or other reasons. Therefore, think creatively about identifying cases and projects that can be efficiently exported to volunteers out-of-state. It would be impossible to list all the firms, organizations, and individuals that pitched in

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[26] *See* Vietnamese American Bar Association of Northern California, News, California Vietnamese American Attorneys Provide Legal Aid to Katrina Survivors in Biloxi, http://www.vabanc.org/news3.html (last visited Feb. 8, 2008); *see also* Audio tape: Gary Michaels, Mississippi Public Broadcasting, Legal Clinic Meets Needs of Coast's Vietnamese (Jan. 22, 2007), http://www.mpbonline.org/news/local-news/0701-archives/documents/070122-gary-Vietnamesehelp.mp3.

[27] Posting of Truc Nguyen, About the Language Access Project, http://justice2biloxi.wordpress.com/ (Sept. 24, 2006, 12:45 a.m.).

from far and wide to help Mississippians in the wake of Katrina, but the following examples chart the tip of the iceberg. Once it became clear that Federal Emergency Management Agency (FEMA) appeals were well suited to out-of-state representation, Weil Gotshal sent lawyers to Biloxi for sixteen weeks to design a FEMA appeals pro bono project in collaboration with the Lawyers' Committee for Civil Rights Under Law.[28] As a result, more than five hundred FEMA appeals cases went to most of the nation's largest law firms. Latham & Watkins took insurance matters, a crucial issue, and a hard one to obtain counsel for since most firms conflicted out. Covington & Burling wrote the insurance Frequently Asked Questions[29] and provided back-up coaching to legal services lawyers unfamiliar with giving insurance-related advice. Mintz Levin helped with foreclosures, work-outs, and drafting "know your rights" materials as well as a travel guide for our out-of-state volunteers; while Nixon Peabody[30] and Citigroup prepared materials so coast residents could understand the state's grant program and appeals process. DLA Piper partnered with the Lawyers' Committee and the Mississippi Center for Justice to develop an heir's property program to clear title in African American communities. O'Melveny & Myers prosecuted fraud cases for storm victims who lost their recovery funds to unscrupulous contractors. This list leaves out many able attorneys and extraordinary projects, but gives a sense of how disasters require creative thinking about how volunteers can help.

Seek resources beyond traditional representation and brief counsel and advice. Within two weeks of the storm Pfizer donated twelve laptop computers; Morrison & Foerster sent

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[28] Press Release, Weil, Gotshal & Manges LLP, Weil, Gotshal & Manges Externship Program Focuses on Mississippi Katrina Victims (March 8, 2006), http://www.weil.com/news/newsdetail.aspx?news=25073.

[29] COVINGTON & BURLING, FREQUENTLY ASKED QUESTIONS: POST-HURRICANE INSURANCE ISSUES (Sept. 7, 2006), http://www.probono.net/ms/library/item.114112.

[30] NIXON PEABODY LLP, NIXON PEABODY AND THE MISSISSIPPI CENTER FOR JUSTICE OFFER HELP WITH THE MISSISSIPPI HOMEOWNER ASSISTANCE GRANT PROGRAM: A NEW "HOW-TO" MANUAL WILL BE USED TO EXPLAIN THE GRANT PROGRAM FOR HOMEOWNERS DISPLACED BY HURRICANE KATRINA (Jan. 4, 2007), http://mscenterforjustice.org/NixonPeabody.swf.

seven printers and a truckload of file folders; Steve Gray of the Legal Services National Technology Assistance Project provided IT help; Manatt Phelps completed 501(c)(3) applications for new disaster assistance nonprofits; O'Melveny & Myers researched legislative fixes; and Nixon Peabody conducted tax credit trainings and helped craft affordable housing development strategies.

The national advocacy organizations will provide indispensable help with training, community education, and strategy advice. Mississippi was particularly fortunate to have an affiliation with the Lawyers' Committee for Civil Rights Under Law, whose expertise in community economic development and housing continues to be the engine of progress in otherwise overlooked populations.[31] The Public Interest Law Project and Sergeant Shriver National Center on Poverty Law created the indispensible website FEMA Answers,[32] and the National Low Income Housing Coalition, Public Interest Law Project, National Consumer Law Center, Oxfam America, Center on Budget and Policy Priorities, and so many others also played critical roles at countless junctures influencing national strategies and providing guidance on local matters.

The most surprising part of the heroic pro bono response may be the legal academy's outpouring of resources and talent. The Student Hurricane Network is a mighty force that, one hopes, will exist when other states are in need.[33] Not since Freedom Summer of 1964 have so many young people, including law students, come to Mississippi, changing themselves and the region in the process. Some flanked by administrators and professors, law students from University of Southern California to Columbia Law School and all points in between sent teams of student volunteers during semester and spring breaks who paid their own way and slept on church floors to do client intake,

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[31] *See* Lawyers' Committee for Civil Rights Under Law, Community Development Initiative, http://www.lawyerscomm.org/2005website/projects/housing/comminitative.html.

[32] FEMA Answers Home Page, http://femaanswers.org/index.php/Main_Page.

[33] Student Hurricane Network Home Page, http://www.studenthurricanenetwork.org/.

community education and massive data collection projects that continue to underpin most of our advocacy efforts.[34] To tap this invaluable resource, think about the information needed to advocate for impacted communities, then dispatch teams of students with survey instruments and specific instructions on where to go and how to organize the data in usable formats. Mississippi Center for Justice used volunteers to conduct surveys of justice court evictions, apartment complex damage,[35] FEMA trailer park conditions, community history work, and other projects detailed in the Mississippi Center for Justice's newsletters.

E. Be aware that legal needs after a disaster come in "seasons."

In the triage stage disaster victims need advice and counsel regarding evictions, FEMA applications, price-gouging, and document replacement. Later, insurance disputes, bankruptcy, foreclosures, heir property and title concerns, and consumer fraud issues will become more relevant. Line up volunteer and training resources accordingly.

F. Quickly adopt a pro hac vice order.

If the need is great enough, seek out-of-state lawyers to provide pro bono assistance to disaster victims. Have a plan to augment staffing of the pro bono organization in order to handle the increased load. Fortunately, the Mississippi Bar petitioned quickly, and the Mississippi Supreme Court responded immediately with orders permitting *pro hac vice* pro bono disaster recovery service that the bar and Mississippi Volunteer Lawyers Project are administering with minimal administrative burden.[36] In February 2007, the American Bar Association

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[34] *See, e.g.*, Amy Applegate, Professor of Law, Indiana University, Biloxi Journal–PILF Hurricane Relief Trip (Dec. 2006), http://mscenterforjustice.org/policy/katrina.html (follow "Journal of an Indiana University Law Student's work on the Gulf Coast" hyperlink); Mississippi Center for Justice, http://mscenterforjustice.org/policy/katrina.html; Wisconsin Blogspot, http://wisconsinshn.blogspot.com/index.html.

[35] Mississippi Center for Justice, Rental Unit Survey of the Mississippi Gulf Coast, http://mscenterforjustice.org/about%20us/survey.html.

[36] In Re: Rules of Professional Conduct, Order Miss. Supreme Court No. 89-R-99018

House of Delegates adopted a Model Court Rule on Provision of Legal Services Following Determination of Major Disaster that can be adapted to any state, to prevent the delays experienced in Mississippi and Louisiana in getting such vital early assistance from willing volunteers.[37]

G. If the ABA Young Lawyers Division/FEMA contract still prevents volunteers from helping with FEMA matters, establish a parallel system to help with ambiguities, appeals, and advice.

The Robert T. Stafford Disaster Relief Act specifically addresses the provision of free legal services to low-income individuals affected by a disaster. Responsible for implementing the Stafford Act, for the last two decades FEMA's Office of Disaster Assistance Programs has fulfilled this mandate per a letter agreement with the ABA YLD to provide volunteer lawyers through the ABA and its local YLD district representatives.[38] However, this means the exemplary Mississippi YLD leadership and its armies of volunteers were "conflicted out" of helping with FEMA problems.[39]

The sad result was the failure to prevent thousands of hurricane victims from the frustration and, in many cases, avoidable homelessness associated with the lack of advice at the outset. Had attorneys identified problems early on or given advice individually at the application stage rather than on appeal, the huge number of FEMA appeals would have been greatly reduced. Had that occurred, many Katrina survivors could have avoided considerable misery and despair. Delays ultimately weighed most heavily on those without alternate

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(Oct. 14, 2005).

[37] MODEL RULES OF PROF'L CONDUCT R. 5.5 & cmt. 14 (2007) (amended Feb. 12, 2007), *available at* http://mebaroverseers.org/Ethics%202000%20Web/Report%20and%20Recommendations/Sec.%206b%20Legal%20Services%20after%20Disaster.pdf.

[38] AGREEMENT BETWEEN THE AMERICAN BAR ASSOCIATION ON BEHALF OF ITS YOUNG LAWYERS DIVISION AND OFFICE OF DISASTER ASSISTANCE PROGRAMS, FEDERAL EMERGENCY MANAGEMENT AGENCY CONCERNING DISASTER LEGAL SERVICES 36, 38-39 (July 13, 1993), http://www.msbar.org/admin/spotimages/1069.pdf. *See also* Jones, *supra* note 1, at 14.

[39] At the time Hurricane Katrtina struck, the Mississippi Bar had 6,655 in-state members and 900 members on the Mississippi coast. Jones, *supra* note 1, at 15.

resources, a burden borne disproportionately by our clients.

Similarly, you will want to ensure that FEMA is being monitored, a central repository for reporting problems identified, and more direct lines of communication with FEMA's General Counsel and leadership established. Hopefully this could help obviate the need for some of the many federal lawsuits that became necessary.[40]

H. Go to where the clients are.

FEMA Disaster Recovery Centers were not set up quickly in Mississippi's most affected region, and many closed only a few months after the storm. But even if they had opened earlier and stayed longer, many of our clients would not have learned about assistance through mainstream outreach efforts. Find the trusted sources of information in low-income neighborhoods and places where people are already gathering. Often these include faith-based organizations, community centers, shelters, and high-traffic nonprofits. Make sure legal help reaches non-English speakers who typically become the most invisible victims of a disaster.

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[40] *See, e.g.*, Ridgley v. FEMA 512 F. 3d 727 (5th Cir. 2008) (district court granted motion for preliminary injunction and ordered FEMA to stop terminating rental assistance, collecting overpayments, or resolving appeals until FEMA provides adequate advanced written notice setting forth the reason for the termination or alleged overpayment and further providing the recipient with the opportunity to have a hearing before any action is taken to terminate benefits or recover an alleged overpayment; Fifth Circuit reversed and remanded holding grant of preliminary injunction was abuse of discretion); ACORN v. FEMA, 463 F. Supp. 2d 26 (D.D.C. 2006) (restoring Section 403 benefits to all evacuees who, as of August 31, 2006, had been found ineligible for Section 408 benefits until such time as they have received detailed explanations why they were ineligible and are allowed appeals of those decisions); McWaters v. FEMA, 436 F. Supp. 2d 802, 813 (E.D. La. 2006) (class action requiring FEMA to extend the hotel/motel program until February 2006); Settlement Agreement, Brou v. FEMA 06-0838 (E.D. La. Sept. 26, 2006) (settlement required that FEMA trailers meet Uniform Federal Accessibility Standards for evacuees with disabilities and established special toll-free numbers for evacuees who need accessible trailers from FEMA).

I. Coordinate between YLD intake, legal aid, and pro bono programs to ensure issues are covered and with the minimum amount of referrals.

It is critically important to minimize the burden on the clients. Reduce the number of times the clients must tell their story, deliver their documents, and disclose intimate details about their lives and problems. Without an integrated post-disaster system, a person may start at the DRC with a YLD volunteer who refers him to a legal aid office that then sends him to the pro bono program who still needs to find a pro bono attorney because that is the only source of help for that particular problem. Repeating a story four times is the kind of emotional and financial strip-searching that can quickly become nearly as frustrating as the original problem the individual sought help to fix.

J. Tell the true story about the community.

Misinformation about response and recovery abounds beyond and within the disaster zone. Develop relationships with journalists and use videos, websites, and press releases to make sure the full story gets told, including the role that law and lawyers have in healing lives and solving problems.

After Karen Lash's first Coast visit she and her traveling companions were shocked to find that despite national reporting to the contrary, they could not find evidence that a single FEMA official had established a presence in any of the three hardest hit Mississippi counties.[41] Writing about what they observed, Martha Bergmark and Karen sent an op-ed-like piece out into cyberspace, where it was published in more than a dozen hardcopy and internet publications, referred to on various public radio stations, and forwarded to friends and family and colleagues as well as their friends and families and colleagues. The piece caught fire and brought attention, volunteers, and

[41] Karen A. Lash, *The Forever Elsewhere Management Agency: In Gulfport, Miss., 13 days after Katrina roared through, we couldn't find one resident who had ever seen a FEMA official*, SALON.COM, Sept. 14, 2005, http://dir.salon.com/story/news/feature/2005/09/14/gulfport/index.html.

other resources because it was a story not being told and desperately needed telling.

Similarly, when local advocates learned in the spring of 2006 that FEMA was beginning to evict as many as 3,000 families from trailers that many of them had only just received, they could not get traction with conventional advocacy methods. We alerted the press, including *Los Angeles Times* reporter Richard Faussett,[42] *New York Times* reporter Shaila Dewan,[43] and National Public Radio's Noah Adams.[44] These stories, paired with the efforts of the Lawyers' Committee and other advocacy organizations, got the attention of Senator Joe Leiberman, who quickly put an end to this indefensible action, preventing homelessness for these families.[45]

K. Get a seat at the table when policy and resource decisions are made that affect low- and moderate-income disaster victims.

As noted at the outset, ensure that influential public and private sector advocate voices are part of the conversation from day one. Joining the conversation late in the game increases the odds that one's posture will be defensive and/or adversarial and thus far less effective. The highest priority should be strategically influencing decision-making about how federal dollars are spent and putting in place oversight mechanisms to guarantee that these funds reach low- and moderate-income disaster survivors from the very outset. Legislation requiring state oversight and transparency was defeated by Mississippi's Governor Haley Barbour.[46] Consequently, a significant amount

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[42] Richard Fausset, *30 Days' Notice at the FEMA Trailer*, L.A. TIMES, May 20, 2006, at A1.

[43] Shaila Dewan, *FEMA Halts Evictions from Trailers in Mississippi*, N.Y. TIMES, June 22, 2006, at A16.

[44] *Noah Adams: FEMA seeks to Evict 3,000 Displaced by Katrina* (National Public Radio broadcast May 24, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5427894.

[45] Dewan, *supra* note 43, at A16.

[46] On March 15, 2006, Governor Barbour vetoed House Bill 1320, which would have required financial accountability through reporting requirements on the use of Mississippi's CDBG disaster recovery funds. H.R. B. 1320 (Reg. Sess. 2006); *see also* Geoff Pender, *Legislators Weigh in with Their Priorities Post-Katrina*, SUN HERALD, Aug.

of advocate and pro bono hours have been spent attempting to influence spending and policy to ensure an open, fair, and equitable recovery that involves the community in the planning process.[47]

L. Include community lawyering as part of disaster recovery model.

Community organizations are essential partners in disaster recovery from inception to conclusion. Pro bono legal strategies should include assistance to community groups because they provide conduits to direct service, to culturally competent educational outreach, and to economic development opportunities. After natural disasters, it is especially important to provide organizational and compliance services to newly formed community organizations, since these frequently will be led by newcomers to the complex world of nonprofit governance and finance.

Community organizations provide important opportunities for innovation to occur in smaller scale and at greater speed than state or federal recovery programs. As a result, community groups can lead the way with proven pilot programs. Working with community organizations is especially attractive to transaction and real estate practitioners in national law firms, and can augment the power of local public interest advocates.

27, 2006.

[47] Advocates succeeded in persuading Governor Barbour to double the size of the Phase II home grant program and exempt very low-income households from the insurance penalty. *See* Press Release, Steps Coalition Welcomes Revisions to Home Grant Program, Dec. 20, 2006, http://tinyurl.com/22totl. On the other hand, advocates so far have not prevented Governor Barbour from diverting $600 million in federal money intended to help low- and moderate-income families rebuild housing and quadruple the size of the state Port of Gulfport. *See, e.g*, Editorial, *More Housing Woes in Mississippi*, N.Y. TIMES, Sept. 27, 2007, at A32; Jenny Jarvie, *Katrina housing aid going to port instead: The U.S. approves Mississippi's plan to divert $600 million. Critics say the poor are being shortchanged.*, L.A. TIMES, Jan. 26, 2008, at 14 (Main News); *Bill Moyers Journal: Katrina Recovery Gone Wrong?* (PBS television broadcast Nov. 16, 2007), *available at* http://www.pbs.org/moyers/journal/11162007/watch2.html; Karen Lash & Reilly Morse, *Seeking Shelter from the Storm,* SUN HERALD, Oct. 17, 2007; Karen Lash & Reilly Morse, *CON–Port of Gulfport: Should MDA divert $600 million in housing funds to restore port?*, CLARION-LEDGER, Oct. 7, 2007.

IV. POSTSCRIPT

The paramount question in public interest work following a massive natural or manmade disaster is how to sustain the advocacy effort over the multiple years it will to take to reinvent the impacted area. Imagine the chill Karen Lash felt on a conference call a week after the storm when legal services lawyers in California, New York, and Florida reported that years later their dockets are still filled with disaster-related cases, but the corresponding surge in interest to do pro bono or fund the extra lawyers needed to handle the caseload had long ago disappeared. We are indescribably grateful but at a loss to explain the on-going pro bono support and interest we are still getting well beyond the twenty-four month mark. We believe the silver lining to the nation's worst natural disaster has been a renewed awakening to the stark realities of racism and poverty in America. And a belief that perhaps this time America can permanently alter living conditions in its two poorest states. And a sense that if we can do it in Mississippi and Louisiana, we can do it everywhere.

That may be the ultimate lesson that has resonance and relevance for the nation: that a terrible disaster may also be an opportunity to reconcile the wealth disparities in the United States, the richest country in the history of the world. Perhaps the on-going outpouring of assistance, for which we cannot possibly express adequate thanks, means we are really ready to "build" upon the premise that preserving the poverty status quo is, finally, no longer acceptable.

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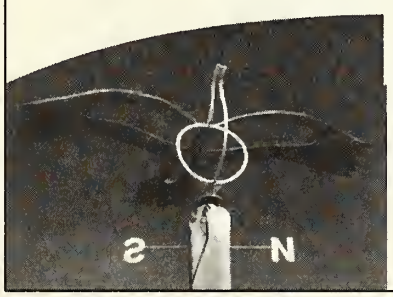

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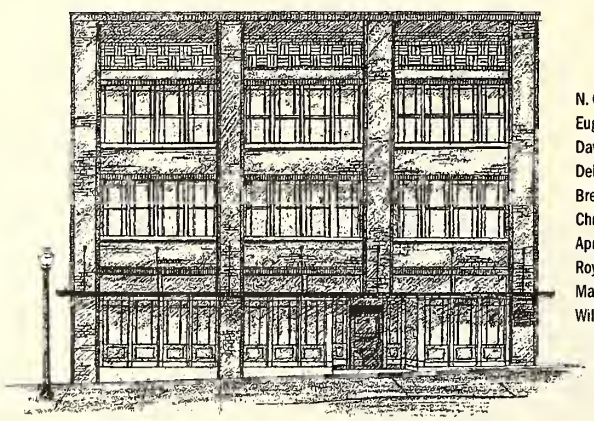

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in reverent memory of the many souls
who perished in her fury;
with gratitude to the thousands of volunteers
who continue to give of their time, money, and talents;
and to those everywhere whose lives were forever
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